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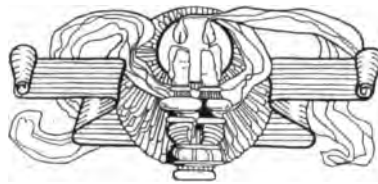




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*Henry Wager Halleck*

HALLECK'S  
INTERNATIONAL LAW

OR

*RULES REGULATING THE INTERCOURSE OF STATES  
IN PEACE AND WAR*

*A NEW EDITION*

*REVISED WITH NOTES AND CASES*

BY

SIR SHERSTON BAKER, BART.

OF LINCOLN'S INN, BARRISTER-AT-LAW

VOL. I.

LONDON

C. KEGAN PAUL & CO., 1 PATERNOSTER SQUARE

1878



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TO THE  
RIGHT HONOURABLE  
JOHN DUKE, BARON COLERIDGE

OF OTTERY ST MARY, IN THE COUNTY OF DEVON  
LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS  
ONE OF HER MAJESTY'S PRIVY COUNCIL  
ETC.

THIS EDITION OF  
HALLECK'S INTERNATIONAL LAW  
IS INSCRIBED  
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OF  
THE EDITOR

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## PREFACE

TO

THE NEW EDITION.

— ♦ —

THE first edition of this work was published in 1861, since which time many important changes and events have occurred ; great wars have been waged, and important victories have imprinted their mark on the history of the world ; questions innumerable in that law which regulates the intercourse of nations between themselves, or—as Bentham designates it—International Law, have from time to time arisen, and invited the serious attention of statesmen and publicists. The doctrine of the preservation of the balance of Power, a principle which had been recognised in Europe for upwards of two centuries, was much agitated in 1865–66, owing to the encroachments of Austria and Prussia, and afterwards of Prussia alone, upon Denmark ; it served also as the pretext for war between France and Germany in 1870. The principle, although much shaken, came under discussion in 1877 with regard to the aggressions of Russia in the east of Europe, and at this moment is again being discussed ; it will, probably, ere long occupy the attention of a Congress or Conference—expressions for diplomatic

assemblies—concerning which it may be mentioned, by the way, on the authority of Lord Beaconsfield, that there is no difference between them. Closely allied with the principle above mentioned is the question of intervention, exemplified in the interference of Sardinia with the Papal Government in 1866, and again in 1870, when the Government of Italy took possession of Rome, depriving the late Pope Pius IX. of his temporal power. The *Plébiscite*, an uncertain political weapon, scarcely to be depended on to gauge the real feelings of the majority, was made use of on that occasion; but while it then served to augment the territory of the kingdom of Italy, it had also served to deprive that State of Nice and Savoy, to the advantage of France. Other matters which claim attention are the important questions raised during the Civil War in the United States of America, concerning the recognition of the Confederate States, as a *de facto* Government, by the Neutral Powers; also, concerning the rights of a belligerent and the duties of a neutral with respect to blockade and contraband of war; the ‘Trent’ affair, which resulted in the right of the inviolability of diplomatic agents and envoys, when in a neutral ship and bound from one neutral port to another, being definitively established; the treaties with China and Japan, by virtue of which Great Britain, in 1865, established a Supreme Court of Justice at Shanghai, with provincial courts in various parts of China and of Japan; the ‘Alabama’ controversy, and the three rules of neutrality of the Treaty of Washington, 1870, followed by a reference of the claims in dispute between Great Britain and the United States to an international tribunal of arbitrators; the revised statute, commonly

called 'The Foreign Enlistment Act,' passed by the Parliament of Great Britain in 1870, for the purpose of more carefully regulating the conduct of British subjects during the existence of hostilities between foreign States with which Great Britain may be at peace; the annexation of Alsace and Lorraine to Germany at the close of the last Franco-German War, by which the inhabitants were forced against their will either to submit to be incorporated with an alien State, or to abandon their homes; the Conference of London in 1871, which abrogated the neutralisation of the Black Sea; the controversy as to the extra-territoriality of ships of war which arose in 1875, with reference to fugitive slaves on board of such ships when in foreign waters; the conflict of judicial opinion, which prevailed in the case of the 'Franconia,' concerning the jurisdiction of English courts of justice over crimes committed by foreigners in foreign ships but within British territorial waters (the Legislature is now dealing with the question); the augmentation of the treaties between the various Powers for the mutual extradition of criminals; the case of the 'Huascar,' in 1877, which raised a nice question between Great Britain and Peru with regard to the loss of national character by that ship, and the definition of piracy; and the jurisdiction of the international courts in Egypt, with respect to the public property of that State.

Concerning, more particularly, war and belligerents should be noticed the Convention of Geneva, 1864, for the amelioration of the condition of the sick and wounded in time of war; the additional articles to the same Convention agreed on in 1868, but not yet



adopted; the Declaration of St. Petersburg, 1868, limiting the use of explosive bullets to certain conditions; and the Brussels Conference, 1874, resulting in a project for an international declaration concerning the laws and customs of war, which, however, the British Government considered inexpedient, and which has not, to the present time, been adopted by any Power.

The felicitous assumption by Her Most Gracious Majesty Queen Victoria, in 1876, of the addition to the royal style and title, in India, of 'Empress of India,' has marked a new era in the relations of Great Britain with that important dependency.

Among the writers on International Law during the past seventeen years may be mentioned the Right Hon. Mountague Bernard, who published, in 1870, his 'Historical Account of the Neutrality of Great Britain during the American Civil War;' Sir Travers Twiss, well known for his work on the 'Law of Nations;' Dr. Theodore D. Woolsey, late President of Yale College; Mr. Lawrence and Mr. Dana, editors of 'Wheaton's International Law;' Sir Edward Creasy, author of the 'First Platform of International Law;' Sir W. Vernon Harcourt, author of the 'Letters of Historicus;' Mr. Sheldon Amos, editor of 'Manning's International Law;' and Mr. Abdy, editor of an abbreviation of 'Kent's Commentaries.' Sir Robert Phillimore also, during the interval, has brought out a new edition of his book, which is a mine of wealth for all students in this branch of law.

The successive historic events and the many new legal questions that have been determined, or discussed, have caused me to make considerable additions to this work, which now, without reckoning the Reports of

Judicial Decisions, the Statutes, or the Orders in Council, contains nearly five hundred quotations and authorities ; and this, I regret to say, has caused an increase in the size of the work. I have taken the opportunity of varying the position of the chapters, so as to group together those which treat more especially of *peace* in the first volume, and those which treat of *war* in the second volume ; but the original text of the chapters is practically unaltered, the exceptions being, some interpolations of my own, distinguished by means of brackets, and the omission of some unnecessary sentences. Elsewhere the new subject matter, whenever combined with chapters, is universally shown in the form of notes, and in smaller type. In the first edition the author supplied a list of authorities to each paragraph. These lists were frequently repetitions of each other, so much so that in a chapter of thirty paragraphs the same authorities were found repeated almost as often. As such repetitions are obviously unnecessary, I have expunged the repetitions, and refer the reader to the end of the first paragraph in each chapter for the principal authorities which govern the whole or greater part of the text of the same ; at the conclusion of each paragraph, I have mentioned other authorities, in which information is to be more especially obtained either in favour of, or against, the proposition discussed.

With the view of placing this work before the public at as early a date as possible, I have in this edition limited myself to a revision of History in general, and especially of Law : it must not therefore be assumed that I approve of every commentary or expression of opinion of the author.

The late Sir Edward Creasy, in his 'First Platform of International Law,' p. 81, thus speaks of this work : 'A book thus written by a practical soldier and statesman who was also a man of learning and industry is, as might be expected, characterised by clearness and strong common sense. He never shirks a difficulty. The only fault of the volume is that it has no index.'

I have preceded the chapters by a short Memoir of the author, and by a list of the reported cases referred to in the chapters. At the end, I have affixed an appendix ; and, following the idea suggested by Sir Edward Creasy, have also added an index, which has been kindly prepared for me by my friend Mr. Louis J. V. Amos, of Clement's Inn.

I should further mention that I have derived considerable assistance in my arduous task from the valuable digests of Mr. Pritchard and of Mr. Abbott, and also from the excellent collection of cases in the numbers of the 'Law Magazine.'

In presenting this edition to the legal profession and to the public, I must trust to their generosity and forbearance to atone for the many defects and shortcomings of my labours.

S. B.

THE TEMPLE : *March 1, 1878.*

PREFACE  
TO  
THE FIRST EDITION.

---

DURING the war between the United States and Mexico, the author, while serving on the staff of the commander of the Pacific squadron, and as Secretary of State of California, was often required to give opinions on questions of international law growing out of the operations of the war. As it was sometimes difficult or impossible to procure books of reference, except in the libraries of ships of war which occasionally touched at the ports of the northern Pacific, he commenced a series of notes and extracts, which were arranged under different heads, convenient for use. The manuscript so formed has been occasionally added to as new books were procured, and it is now given to the press, with the hope that it may be found useful to officers of the army and navy, and possibly also, to the professional lawyer. With this view, a number of authorities are referred to at the end of each paragraph. It is proper to remark that these authorities are not quoted in support of the views expressed in the text, for they are sometimes directly opposed to the opinions so expressed. They will, however, be found to contain something upon the questions discussed, or upon matters immediately connected with them.

H, W. H.

SAN FRANCISCO, CAL.  
*May, 1861.*





## MEMOIR OF THE AUTHOR

*BY THE EDITOR.*

---

HENRY WAGER HALLECK, the compiler of this treatise on International Law, was born at Waterville, in the State of New York, U.S., on January 15, 1815. His father was the Honourable Joseph Halleck; his mother, the niece of the Rev. Daniel Wager, of Ghent, was related to the Wager family of Columbia.

After receiving the ordinary preliminary instruction at Union College, Schenectady, Mr. Halleck entered the Military Academy at West Point, in 1835, where he graduated four years later. Shortly afterwards, on receiving his commission as second lieutenant, he was appointed to the post of Assistant-Engineer at the fortifications in the harbour of New York, which were then in course of construction. He retained this appointment until 1845, when he became a first lieutenant. This promotion was closely followed by his nomination, as Lecturer, to the Lowell Institute at Boston, a duty which he discharged for a few months, delivering several excellent Lectures on the principles of Military Art and Science. Shortly afterwards, by order of the Government of the United States, he proceeded to Europe, with the object of acquiring more specific knowledge in the principal military establishments of the Old World. He was particularly distinguished for his proficiency in the science of war, and on his return to the United States in the following year (1846), published the substance of his former lectures, under the

title of 'Elements of Military Art and Science.' In the same year he was ordered to California, where he attained the rank of brevet captain in 1847, and of captain in 1853. He served on the lower Californian coast as one of the staff of Commodore Shubrick, the commander of the Pacific Squadron, during the war between Mexico and the United States.

Congress having failed to provide a new government for California, to replace that which existed before its annexation to the United States, General Riley, acting under the instructions of the Secretary of War of the United States, assumed the administration of civil affairs in that State, not as a military governor, but as the executive of the existing civil government, and on a Convention being summoned by General Riley, as the Governor, in June 1849, for the purpose of framing a constitution for California, Mr. Halleck, then Secretary of State for California, was chosen one of the delegates for Monterey, and discharged his trust with great ability. In October of the same year the delegates having terminated their labours, submitted a plan of government for approval, on which occasion the Governor publicly declared:—'My success in the affairs of California is mainly owing to the efficient aid rendered to me by the Secretary of State. He has stood by me in all emergencies; to him I have always appealed when at a loss myself, and he has never failed me.'

Although deeply engaged in the affairs of the Constitution, Mr. Halleck found time to take part in other pursuits, and as Director-General of the New Almaden Quicksilver Mines, acquired a practical knowledge of mining.

In 1854 he retired from the army—*Cedant arma togæ*!—and as the leading member of a firm of lawyers practised law in San Francisco, devoting himself to the study of the laws and Constitution which, as delegate, he had taken so active a part in producing. He was also President of the Railway Company. It was during this interval of peace that he published the present work.

On the breaking out of the Civil War, Mr. Halleck cast

aside the toga and again assumed the sword. He was one of the four Majors-General first appointed, and on the recommendation of General Scott, was nominated to the command of the military department of the West, with headquarters at St. Louis. To his military skill may be attributed in great measure the success which attended the arms of the Federal forces. Having commanded in the field in the Corinth campaign, during the early part of 1862, he was appointed General-in-Chief of the Armies of the United States, on July 11 of the same year, and occupied that post till 1864, during which time all negroes and newspaper correspondents were forbidden access to the ranks of his army. In 1864 Major-General Halleck was named Chief of Staff of the War Department at Washington, which appointment he held till April 1865, when he took command of the military division of the James, with headquarters at Richmond, changing that for the military division of the Pacific in the following August, and finally leaving the latter in March 1869, to take command of the military division of the South, with headquarters at Louisville, Kentucky, in which city he died, January 9, 1872, at the age of fifty-five.

Mr. Halleck was one of those persons who are able to adapt themselves to the varying circumstances of a change of life and habits ; when a soldier, he was completely a soldier ; when a civilian, not a vestige of the soldier remained. In stature, he was below the medium height, but was straight and active ; brisk and energetic in his gait ; his nose, delicate and well formed ; his forehead, ample ; his mouth, by no means devoid of humour ; his eyes, hazel and clear ; his glance, keen and penetrating.

In addition to the attainments before mentioned, he was well versed in the French and Spanish languages. He also published in 1859 'Mining Laws of Spain and Mexico,' and in 1864 edited a translation of Jomini's 'Life of Napoleon,' besides being the author of some smaller works.



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# INTERNATIONAL LAW.

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## CHAPTER I.

### HISTORY OF INTERNATIONAL LAW.

1. Division of the subject—2. International Law among the Jews—3. Among the ancient Greeks and Romans—4. The *jus gentium* of the Romans—5. Introduction of Christianity into the Roman Empire—6. Fall of that Empire and its effects—7. International Law during the dark ages—8. Its origin in modern Europe—9. Injurious effects of Papal supremacy—10. Effects of the Reformation—11. Other causes of its advancement in the middle ages—12. The Rhodian Laws, *Rooles d'Oléron*, etc.—13. The *Consolato del Mare*, *Guidon de la Mer*, etc.—14. Writers on International Law prior to Grotius—15. Writings of Grotius—16. Political events from the peace of Westphalia to that of Utrecht—17. Questions of International Law agitated during that period—18. Writers on Public Law immediately following Grotius—19. Political events from the peace of Utrecht to the end of the Seven Years' war—20. Questions of public law during that period—21. Writings of publicists—22. From the close of the Seven Years' war to the French Revolution—23. Questions of public law during that period—24. Writings on International Law—25. From the beginning of the French Revolution to the Congress of Vienna—26. Questions of International Law during that period—27. Writers on International Law—28. Decisions of judicial tribunals—29. From the Congress of Vienna to the Treaty of Washington—30. Questions of International Law during that period—31. Writers on International Law—32. From the Treaty of Washington to the beginning of Civil War in the United States—33. Questions agitated in America during this period—34. Questions agitated in Europe—35. Text-writers and judicial opinions—36. Diplomatic and legislative discussions.

§ 1. IN the following sketch of the history of International Law, we shall divide the subject into periods of unequal length, but usually marked by some important event, and having reference rather to the progress of the law than the history of nations. This plan seems preferable to that adopted by Hallam, of dividing it arbitrarily into periods

of half a century each. We shall therefore consider the condition of international jurisprudence: 1st, Among the ancients; 2nd, From the beginning of the Christian era to the fall of the Roman Empire; 3rd, From the fall of the Roman Empire to the beginning of the Reformation; 4th, From the beginning of the Reformation to the peace of Westphalia; 5th, From the peace of Westphalia to the peace of Utrecht; 6th, From the peace of Utrecht to the close of the Seven Years' war; 7th, From the close of the Seven Years' war to the beginning of the French Revolution; 8th, From the beginning of French Revolution to the Congresses of Paris and Vienna in 1814 and 1815; 9th, From the Congress of Vienna to the treaty of Washington in 1842; 10th, From treaty of Washington to the Civil War in the United States in 1861.<sup>1</sup>

These divisions are somewhat different from those adopted by other writers, but they seem to us most rational, or at least, as best suited to the very brief historical outline which we propose.

*First Period—International Law among the Ancients.*

§ 2. The history of the Jews, as derived from the Old Testament and the writings of Josephus, furnishes much information relating to the rules by which the ancient Hebrews regulated their intercourse with other nations in peace and war. Grotius and other writers on international jurisprudence have illustrated their own views of public law by numerous examples taken from the history of this singular people, and Selden's *International Law of the Jews*, entitled *De Jure Naturali et Gentium juxta disciplinam Ebræorum*, is a work of great erudition. He very justly distinguishes between the usages and practices which were susceptible of general application, and those limited rules of conduct which constitute the *jus gentium* of the Roman lawyers. As might be expected from an isolated and religious people, most of the laws regulating their international intercourse in peace and war, were of the latter character. Nevertheless the history of the ancient Jews is well worthy of careful study in its connection with this branch of public law; but it must be remembered there is much in the Jewish dispensation,

<sup>1</sup> To which we must add an eleventh period, viz., from the Civil War in the United States, to the present day.

although of Divine revelation, which has exclusive reference to them as a peculiar people, with a special mission to perform, and therefore not of general application.

§ 3. Nearly all our knowledge of international law among ancient States is derived from their intercourse with the Jews, and with the Greeks and Romans, more particularly with the latter. Although no professed treatise on international jurisprudence has been left us by any classical writer, nevertheless much information respecting this branch of public law among the Greeks and Romans has been elicited from their civil laws and military ordinances, and from the history of their numerous wars,—information calculated to throw much light upon the rules by which, at different periods, they regulated their intercourse with other nations. Most of these rules were exclusively founded on religion. ‘The laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites. Ambassadors, heralds, and fugitives who took refuge in the temples, or on the household hearth, were deemed inviolable *because* they were invested with a sacred character and the symbols of religion. Treaties were sanctioned with solemn oaths, the violation of which, it was believed, must be followed by the vengeance of the Gods. War between nations of the same race and religion was declared with sacred rites and ceremonies. The heralds proclaimed its existence by devoting the enemy to the infernal deities.’

§ 4. What was called the law of nations (*jus gentium*) by the Romans, was not any positive system or code of jurisprudence established by the consent of all, or even the greater part, of the nations of the world, and applicable alike to themselves and others; it was simply a civil law of their own, made for the purpose of regulating their own conduct towards others in the hostile intercourse of war. It was, therefore, contracted in its nature, and somewhat illiberal in the character of its provisions. In proportion, however, as the Roman empire was extended, and as the Roman people established distant provinces and assimilated to itself the nations which it conquered, the *jus gentium* became more general and comprehensive in its character and more liberal in its precepts.



The Romans early incorporated into their maritime laws the principles of the nautical code of the Greeks, and as their commerce and intercourse with other nations increased, these laws became more liberal and general in their character and provisions. Many fragments of these old laws are still preserved and may be traced in the Code Theodosian, the Code, Digest, and Pandects of Justinian, in the Basilicæ, and the Maritime Constitutions promulgated by the Emperor Leon.<sup>1</sup>

*Second Period—From the Christian Era to the Fall of the Roman Empire.*

§ 5. The doctrines of the Christian religion, and the universality of their application, were well calculated to give a milder character and a greater extension to the principles of international law, than they had received either under the Jewish dispensation, or the defective and multifarious system of the Greek and Roman mythology. But its progress was comparatively slow, and the bitter persecutions suffered by the early Christians naturally engendered a spirit of retaliation. Moreover, it must be continually borne in mind, while tracing the history of international relations during the reigns of Constantine and the succeeding Christian emperors, that the contests which they carried on with barbarous States were not of a character to develop the refinements of a *commercium belli*, or even to cause the observance of the acknowledged usages of war, or the previously established practices of international intercourse in peace. It is also to be observed that the seeds of intellectual disease had already been sown, and that all branches of learning were on the decline, before the acknowledgment and toleration of Christianity in the empire, by the formal edict of pacification at the hands of Constantine. 'The revolution accomplished by Constantine,' says Schlegel, 'might have become a real, and by far the most comprehensive, regeneration of the Roman State, as it substituted for its originally defective and now completely rotten foundation of paganism, a new principle of life, and a higher and more potent energy of divine truth and eternal

<sup>1</sup> Wheaton, *Hist. Law of Nations*; Ward, *Law of Nations*, vol. i. pp. 171 et seq.; Manning, *Law of Nations*; Boulay-Paty, *Droit Com. Mar.*, t. i. pp. 33-54; Pardessus, *Us et Coutumes de la Mer*, tom. i. caps. 1-5; Laurent, *Droit des Gens*; Ritter de Fezial, *Pop. Rom.*

justice. But Christianity had not yet become the universal religion of the people, and the empire of Rome,—otherwise the great reaction, which took place under Julian, had not been possible. The peasantry, in particular, continued for a long time yet attached to the old idolatry; and hence the name of pagans was derived. Even Constantine, though he publicly declared himself a convert to Christianity, still did not dare to receive baptism immediately, and thus enter fully into the great community of Christians. The administration of the Roman State was so completely interwoven with pagan rites and pagan doctrines, that, from an act of this public nature, dangerous collisions might have at first easily ensued. On the whole, the old Roman maxims and principles of State policy continued to prevail, even for a long time after the reign of Constantine; and the period had not yet arrived when Christianity was to work a fundamental reform throughout the whole political world,—and a Christian government, if I may so speak, was to be established and organised on that eternal basis, and to strike a deep root and grow into the faith and life of the people, and into their habits and their feelings; but this great renovation was reserved for another and a later period.'

§ 6. It is not within the object of this chapter to investigate or describe the causes which finally overthrew the mighty fabric which valour and policy had founded on the seven hills of Rome, nor to trace the history of those barbarous nations of the north, who, by their martial energy and irresistible numbers and force, imposed their yoke upon the ancient possessors of that vast empire, and permanently settled themselves in its fairest provinces. The decline of taste and knowledge for several preceding ages, and the general corruption of political partisans and office-holders, had prepared the way for this revolution, and the establishment of the barbarian nations on the ruins of the Roman empire in the west, was accompanied, or immediately followed, by an almost universal loss of that learning which had been accumulated in the Greek and Latin languages. What of classical learning is still preserved to us, is the mere fragments of those magnificent intellectual temples, which industrious antiquaries have dug up from the vast ruins of ancient greatness. These fragments, however, are sufficient to show



the grandeur of the original structure and the beauty of its architecture; and the value of what remains only increases our regret for what is irrecoverably lost.<sup>1</sup>

*Third Period—From the Fall of the Roman Empire to the Beginning of the Reformation.*

§ 7. After the fall of the Roman Empire, many cities still preserved their municipal constitutions, and the *jus gentium*, in connection with the *jus civile*, into which many of its principles had become incorporated, continued to be practised to a limited extent, both in Italy and the provinces. Some have attempted to trace its influence upon the institutions and history of the different European nations, even through the darkest ages of human learning; it must, however, be admitted that this influence was not very marked in any case, and was by no means general. But on the restoration of the western empire under Charlemagne, the study of the Roman civil law (and with it the *jus gentium*) was revived, and its professors were frequently employed in diplomatic missions, and as arbiters in disputes which arose between different cities and States.

§ 8. The origin of the law of nations in modern Europe has been traced to two principal sources,—the canon law, and the Roman civil law. It was founded, says Wheaton, mainly upon the following circumstances: 'First, The union of the Latin Church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced into a code, which served as the rule to guide the decisions of the Church in public as well as private controversies. Second, The revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal code, or as subsidiary to the local legislation of each country.'

§ 9. On the formation and consolidation of the Christian government in modern times by Charlemagne, the human mind began to recover from its torpor, and art, science, and

<sup>1</sup> Hallam, *Literature of Europe*, vol. i. pp. 1, 2; Schlegel, *Philosophy of History*, lec. x.; Gibbon, *Decline and Fall of the Roman Empire*; Garden, *De la Diplomatie*, pt. 1.



learning sprung up out of the ruins of the ancient world. The Church had constituted a kind of bridge, spanning the chaotic gulf which separated declining antiquity from modern civilisation. The effects which this change produced upon international relations, and public law in general, may be traced in the lives of such rulers as Charlemagne, the pious King Alfred, King Stephen of Hungary, Rodolph of Hapsburg, and St. Louis of France.

The power which the Bishop of Rome obtained, by his spiritual influence, first over the minds, and afterwards over the temporalities of Christian princes, did much for the civilisation of Europe by the restoration and preservation of peace,<sup>1</sup> and by restraining the ambitious and crafty from despoiling their neighbours. But the subsequent usurpations and tyranny of the Supreme Pontiff had well nigh destroyed the very foundation of international jurisprudence, by reducing each individual state to an absolute dependence, in all things, upon the Papal will. The structure which Christianity had rebuilt from the ruins of antiquity, was about to be pulled down by the very hands which had contributed most to its erection.<sup>2</sup>

*Fourth Period.—From the Beginning of the Reformation to the Peace of Westphalia.*

§ 10. The Reformation began to produce its effects upon the minds of men sometime prior to the advent of Luther. Its effects were by no means confined to articles of religious

<sup>1</sup> Thus, it was decreed by the Synod of Rossillon, in 1027, that none should attack his enemy between the nones of Saturday and the primes of Monday. The *Frera* or *Treuga Dei* (Truce of God) was proposed, by the Bishop of Aquitaine, in 1032. This truce was to begin on every Wednesday at sunset, and to last till the following Monday at sunrise, to continue from Advent to the octaves of Epiphany, and from Quinquagesima Sunday to the octaves of Easter; if any person broke this truce, and refused to give satisfaction after the third admonition, the bishop of the diocese was to excommunicate him, neither was any bishop to admit the excommunicated person into communion, under the penalty of deprivation. It was confirmed by many Councils, and especially by the Lateran Council in 1179. Some of the regulations were even extended to England, inasmuch as Wednesday and Friday were days set apart for keeping peace. Further, in the beginning of the twelfth century, Gerohus wrote a treatise, suggesting a theory of perpetual pacification, by which (*inter alia*) all disputes among Christian princes were to be referred to the arbitration of the Pope, and any prince refusing to obey the decision, was to be subject to excommunication, and to have war waged against him by all the other princes of Christendom.

<sup>2</sup> Laurent, *Droit des Gens*, tome v.; Ward, *Law of Nations*, vol. ii.

faith. A greater theological liberty was its immediate object, but this was intimately allied with political freedom; and these two necessarily caused a great change in the law of nations. The different States of Europe were ranged under different standards, and each party was united by a kind of *common cause*. Moreover, the separate members of each of the contending masses were bound together by principle or interest, rather than by any recognised paramount authority, for even the Catholic States soon ceased to render full obedience to Papal supremacy in matters purely temporal. This necessarily led to the independence of sovereign States, the true basis of international jurisprudence. The impulse which had been given to this subject by the canon law was gradually dying away, and the infant science was likely to be smothered and lost by Papal dictation and tyranny, when the more liberal nations, engendered by the Reformation, rescued it from destruction and placed it upon a more sure and firm foundation. Its progress was thenceforth both certain and rapid.

§ 11. Mr. Ward, in his 'Enquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the age of Grotius,' has pointed out and discussed the influence of Christianity and of the ecclesiastical establishments, in laying the foundation and developing the principles of this branch of jurisprudence. He has also called attention to the obstacles placed in the way of its progress by religious intolerance, and the absurd and dangerous pretensions of the Popes to decide and determine, not only international disputes, but all questions relating to temporal matters connected with the government of independent States, and the effects of the Reformation in establishing more liberal principles.<sup>1</sup> Nor has he failed to notice the influence of the Roman law, of the feudal system, of chivalry, of treaties and conventions, and last, though not least, of those twin giants of modern civilisation—Commerce

pp. 6-11; Schlegel, *Philosophy of History*, lec. 15; Manning, *Law of Nations*, pp. 10, 11; Garden, *De la Diplomatie*, pt. 1.; Mackintosh, *Miscell. Works*, p. 165; Wheaton, *Elem. Internat. Law*, pref. to 3rd ed.

<sup>1</sup> It should be noticed that the interference in international disputes and in temporal matters, here spoken of, resulted from the personal opinions of certain of the Popes, with the *consensus* of the whole of Christendom, at certain epochs. It was never a matter of doctrine. See also remarks of Pope Urban VIII., State Paper Office, *Italy*, 1641-42.



and Trade,—and the maritime and commercial laws resulting from the increased intercourse between the people of different cities and countries.<sup>1</sup>

§ 12. The Rhodians were probably among the first to adopt a regular system of laws and regulations relating to maritime trade. The compilation, known under the names of *Rhodian Laws*, and *Maritime Laws of the Rhodians*, was probably not intended merely for the Island of Rhodes, or for the inhabitants of the Ægean Sea, but is rather a collection of maritime usages adopted at different periods and intended for different purposes. Some of them, perhaps, preceded the later maritime laws of Rome and of the eastern empire. Such at least is the opinion of Pardessus. Next to the Rhodian laws are those found existing in the countries of the east conquered by the crusaders. These have been collected and translated by Pardessus. Next in importance we may mention the collection known as the *Rooles* or *Jugemens d'Oléron*. This collection of maritime customs or laws was prepared under the direction of Queen Elenor, Duchess of Guienne, and named from her favourite island, Oléron. Some say it was prepared and first promulgated by her son, Richard I., Duke of Guienne and King of England. By whomsoever prepared, it was probably intended to serve as a maritime code for the western sea only. Next in order, Pardessus describes the collection called *Jugemens de Damme*, or *Lois de Westcapelle*, which is a compilation of the maritime customs of that part of Europe known at different periods as Belgium, Lower-Germany, Netherlands, Flanders, Holland, the United Provinces, etc. The maritime usages or laws known as the *Coutumes d'Amsterdam*, *Laws of Antwerp*, etc., were probably intended exclusively for the northern portion of the Netherlands, and for the navigation of the Baltic and the Sound. The collection known as *Leges Wisbuenses*, or *Maritime Law of Wisbuy*, is supposed to contain the ordinances made by the merchants and masters of the town of Wisbuy, a city in the Island of Gottland, in Sweden, once a place of great commercial importance, but now in ruins. They were adopted by the Swedes and Danes, and probably regarded as authority by all the people beyond the Rhine. Many have considered

<sup>1</sup> Ward, *Law of Nations*; Fabrot, *Basilica*, tom. vi. p. 647; Manning, *Law of Nations*, p. 11.

the Laws of Wisbuy as an older compilation than the Rooles d'Oléron.<sup>1</sup>

§ 13. The *Consolato del Mare* is one of the most curious and venerable monuments of early maritime jurisprudence. Some have given it a very early date, and suppose it to contain the maritime laws and usages of the Greek emperors and of the States and cities bordering on the Mediterranean and adjacent waters. They say it was adopted at Rome as early as 1075, but the researches of Pardessus and others have shown that its origin is much more modern. The first edition which can now be traced was published at Barcelona in 1494. It is regarded by critics as a record of customs rather than an authoritative code of one or more nations. It embraces not only elementary rules for the construction of civil contracts relating to trade and navigation, but also the leading principles then recognised as governing the maritime rights of belligerents and neutrals in time of war. Chapter two hundred and seventy-three of the *Consolato* contains many of the materials of the French *Maritime Ordonnance* of 1681, and many of its provisions and precepts are still referred to by writers on international law and by judges of Admiralty and prize-courts.

The *Guidon de la Mer* is supposed to have been composed for the benefit of the merchant traders of the city of Rouen, but the name of its author, and the date of its first publication, have not been preserved. It is commented on in Cleirac's work, entitled *Les Us et Coutumes de la Mer*, which was published in 1647. Some of the maritime laws of France are supposed to have been first enacted at a very early period, but there is much difficulty in ascertaining their exact dates. Many of them are incorporated into the celebrated *Ordonnance de la Marine* of Louis XIV., published in 1681. From this we date the modern system of maritime and commercial law.<sup>2</sup>

§ 14. The most noted writers, prior to Grotius, on matters connected with international law, were Macchiavelli,

<sup>1</sup> Selden, *De Dominio Maris*, cap. xxiv.; Azuni, *Droit Maritime*, tom. i. ch. iv.; Story, *Miscellaneous Writings*, p. 100; Pardessus, *Us et Coutumes de la Mer*, tom. i. caps. v.-xi.

<sup>2</sup> Emerigon, *Traité des Assurances*, pref.; Cleirac, *Les Us et Coutumes de la Mer*, p. 2 et seq.; Boulay-Paty, *Droit Com. Mar.*, tom. i. pp. 59-82.



Victoria, Soto, Suarez, Ayala, Bolaños, Bodinus, Brunus, and Gentilis.

Nicolo Macchiavelli was born at Florence, in 1469, and died in 1527. He filled various political offices, as Chancellor, Secretary, etc. His principal work, entitled '*Il Principe*,' was probably not intended as a mere scientific treatise, but was written for a particular person, and for the purpose of effecting, at the time, a certain definite object. Its character has, therefore, often been misconceived by commentators. Macchiavelli was a man of learning and talents, and his writings on history and politics had no inconsiderable influence upon his own and succeeding ages. Francisco de Victoria was a professor at the University of Salamanca. His '*Relectiones*' were first published at Lyons, in 1557; they were thirteen in number, but only the fifth and sixth related to subjects of international law. He died in 1633. Dominico Soto, born in 1494, was a pupil of Victoria, and his successor at Salamanca. His elaborate treatise, entitled '*De Justitia et de Jure*,' was published about 1560. Francisco Suarez was a Spanish Jesuit, and the most acute casuist of his age. He was the first to point out, in his treatise '*De Legibus et Deo Legislatore*,' the distinction between natural and consuetudinary law, and to show that international law rested not only on the principles of justice, but also on the usages of nations. He was born at Granada, in 1548, and died in 1617. Strange to say, his work is neither mentioned nor referred to by Grotius. Balthazar Ayala was judge advocate of the Spanish army in the Netherlands under the Prince of Parma, to whom, in 1581, he dedicated his treatise '*De Jure et Officiis Bellicis*.' Juan de Hevia Bolaños was a native of Oviedo, in the Asturias, but his celebrated work, entitled '*Curia Philippica*,' was written in Peru, and, as he informs us, finished at the city of Los Reyes, on Christmas eve, in 1615. It is a work of great learning, and is often referred to on questions of commercial and maritime law. Jean Bodin, or Johannes Bodinus, as he is usually called, was born at Angers, in France, in 1530, and died at Laon, in 1596. His great work, entitled '*De la République*,' was the first attempt at a scientific treatise on politics. Conrad Brunus was a German civilian. His elaborate treatise, entitled '*De Legationibus*,' was first published at Mainz, in

1548. Albericus Gentilis was born in the March of Ancona, in 1550, and died in London in 1608. He first studied in Germany, and afterwards went to England, where he filled the chair of jurisprudence in the University of Oxford. His treatise, entitled '*De Jure Belli*,' was published in 1589, the titles to the chapters of which run almost parallel to those of the first and third books of Grotius. He has the credit of having first mapped off the subject, afterwards so ably treated by that eminent founder of international jurisprudence.

To the above list we may add the names of Peckius, a Belgian, who published his '*Ad Rem Nauticam*,' in 1556, but whose writings were not collected and published together till 1646; of Straccha, an Italian, and Santerna, a Portuguese, whose writings were published in the '*De Mercatura*' at Cologne, in 1623.

§ 15. Hugo Grotius, justly regarded as the founder of modern international law, was the most remarkable man of the age in which he lived,—an age distinguished for men of genius and learning. He was born in 1583 at Delft, Holland. Being involved in the persecution of the pensionary Barneveldt and the other Arminians, he was imprisoned in the fortress of Louvestein, from which he escaped, through the devotion of his heroic wife, and took refuge in France. His great work, '*De Jure Belli ac Pacis*,' was published at Paris in 1625. He died at Rostock in 1645. This work has been translated into all languages, and has elicited the admiration of all nations and of all succeeding ages. Its author is universally regarded as the great master-builder of the science of international jurisprudence. In addition to his reputation as a writer on public law, he was almost equally distinguished as a statesman, diplomatist, historian, and theologian, and as a practical lawyer and eloquent advocate. His works on international law have been objected to for the profusion of classical quotations and historical illustrations, but these defects were necessarily incident to the particular period at which he wrote. These objections were answered by himself during his lifetime, and subsequently by the able and eloquent pen of Sir James Mackintosh. A more serious and well-founded objection has been made to his work, '*De Jure Belli ac Pacis*,' for its want of systematic arrangement, and the introduction of



questions and discussions which do not properly belong to the subject. It is characterized by profound thought, great perspicuity, and the most liberal and enlightened sentiment. Strange, however, as it may appear, the early opponents of his work charged him with attempting to annihilate the three great principles of the Roman law, '*Honeste vivere ; Neminem lædere ; Suum cuique tribuere.*' But such prejudice and puny opposition were soon overcome when the real character of his writings were understood.

Although Grotius had dedicated his great work on international law to Louis XIII. of France, it was strangely neglected by that king, who gave no reward to the author. Charles Louis, Elector Palatine, was the first prince to appreciate its utility, and ordered it to be publicly taught in his university of Heidelberg. The great Gustavus is said to have found the same pleasure in reading it as did Alexander in perusing the poems of Homer, and honoured the author by calling him to a public employment in Sweden. In 1656, it was taught as public law in the university of Wittenberg, and before the close of the century, was universally established as the true fountain-head of European international law. Grotius wrote during the 'Thirty Years' War,'—that fierce struggle for religious and political liberty, which was terminated a short time after his death by an honourable peace, based upon the principles which he had so ably and earnestly advocated.

*Fifth Period—From the Peace of Westphalia to that of Utrecht,*  
1648—1713.

§ 16. The peace of Westphalia, 1648, terminated the long series of wars growing out of the Reformation, and that memorable struggle against the political preponderance of the house of Austria, which, for thirty years, had devastated Germany and the north of Europe. 'The peace that was at last brought about by necessity,' says Schlegel, 'constituted an epoch in European history. It was a great religious pacification—it was a recognition that to terminate by arms the dispute between the ancient faith and the new doctrines was an impossibility, and it was a settlement of legal relations between the adherents of the one creed and of the other.' It not only gave greater religious tolerance and

political liberty to the people of the older States, but also brought into existence new political communities which assumed the position of independent States. It was constantly referred to in subsequent treaties, and continued to form the basis of the conventional law of Europe until the French Revolution.

Although the treaty of Westphalia concluded the war in Germany, it continued to rage in other parts of Europe. The contest between France and Spain was terminated by the treaty of the Pyrenees in 1659; this was followed by the treaties of Oliva and Copenhagen in 1660; that of Aix-la-Chapelle in 1668; that of Nimeguen in 1678; that of Ryswick in 1677; and by that of Utrecht in 1713, which virtually restored the peace of Europe.<sup>1</sup>

§ 17. The long and bloody wars which intervened between the peace of Westphalia, 1648, and that of Utrecht, 1713, and the conventions and treaties by which they were severally suspended or terminated, gave rise to numerous questions of international law, some of which were entirely new in the history of that science. Of the questions particularly discussed we may mention those relating to the independence and sovereignty of States, the liberty of the seas, the interpretation of treaties, the rights of conquest and of pre-emption, the theory of maritime prize, the law of sieges and blockades, the belligerent right of visitation and search, and the treatment due to prisoners of war. In many of these subjects a considerable advance was made from the restricted rules of the *jus gentium* of the Romans, and even from the more liberal principles established by Grotius; but in others the progress of this branch of jurisprudence scarcely kept pace with the increasing civilisation of nations.<sup>2</sup>

§ 18. The principal writers on constitutional law immediately following Grotius were Selden, Hobbes, Puffendorf, Spinoza, Zouch, Loccenius, Molloy, Jenkins, Cumberland, Wicquefort, Rachel and Leibnitz.

John Selden was born in Sussex, England, in 1584, and died in 1634. He wrote a most able work on the law of nations, as derived from the institutions of the ancient Jews; but he is better known by his work entitled 'Mare Clausum,'

<sup>1</sup> Schlegel, *Lectures on Mod. Hist.*, lec. xvii., xviii.

<sup>2</sup> Phillimore, *On Int. Law*, Pref., pp. 12, 13.



published in 1635 as an answer to the 'Mare Liberum' of Grotius. Thomas Hobbes was born in Malmesbury, England, in 1588, and died in 1679. His work entitled 'De Cive' was published in 1647. He adopted the absurd theory that a state of nature is one of perpetual war in which brute force supersedes law and every other principle of action. Samuel Pufendorf was born in Saxony in 1632, and died at Berlin in 1694. He was Professor of Natural Law at Laud and afterwards Secretary of State at Stockholm. His principal work on public law, entitled 'De Jure Naturæ et Gentium,' was published in 1672. This treatise is far superior to that of Grotius in its plan and the mode of reasoning, but is less practical and original, and his style is too diffuse to be attractive. Baruch Spinoza was of a Jewish-Portuguese family, but born at Amsterdam in 1632; he died in 1677. He published a number of political and theological essays called *Tracts*, in some of which he treated of questions of international law. He agreed with Hobbes that the natural state of man is one of war, and avowed the detestable maxims that nations are not bound to observe their treaties any longer than it may be for their interest to do so. Richard Zouch was born at Anstey, Wiltshire, in 1590, and died in 1660. He was Professor of Roman Law at Oxford, England, and judge of the High Court of Admiralty. His principal works on public law, written about 1650, were entitled 'De Jure Feciali, sive Judicio inter Gentes,' and 'De Jure Nautico.' His writings are of high authority even at the present day, and are frequently referred to by English judges and publicists, particularly on questions of maritime law. Contemporary with Zouch was the Swedish professor, Johannes Loccenius, who wrote in 1651. His principal work, entitled 'De Jure Maritimo et Navali,' is often quoted as authority both by English and continental writers. He was born in 1599, and died in 1677. Charles Molloy published the first edition of his work, entitled 'De Jure Maritimo et Navali,' in 1666, and so popular was the book in England, that in 1769, it had reached the ninth edition. He was a native of Ireland, and died in 1690. Sir Leoline Jenkins was a judge of the High Court of Admiralty, of England, and, although he wrote no professed treatise on any branch of public law, his official opinions and his letters (which have since been published) have had great

weight with English judges and much influence upon the decisions of the British Courts of Admiralty. He was born in 1625, and died in 1684. Richard Cumberland was another English writer of great ability, noted rather as a philosopher than a lawyer. He was born in 1632, and died in 1719. His work, entitled 'De Legibus Naturalibus,' was published in 1672. Abraham de Wicquefort was born in Amsterdam, in 1598, and died in 1682. His work on the law of diplomacy, entitled 'L'Ambassadeur et ses Fonctions,' published a short time before his death, was a work of considerable merit. Samuel Rachel was born in 1628, and died in 1691. He was a professor in the university of Kiel, and afterward minister of the Duke of Holstein-Gottorp, at the Congress of Nimeguen. His work, entitled 'De Jure Naturæ et Gentium,' was published in 1676, and he was considered in Germany as the founder of a rival sect to Puffendorf. Baron Gottlieb Wilhelm Leibnitz was born at Leipsic in 1646, and died in 1716. He was the author of numerous works on philosophy and law, but left no complete treatise on international jurisprudence. His views on that subject are found scattered through his various publications and correspondence, and more particularly in his 'Codex Juris Gentium Diplomaticus,' published in 1693.

To the foregoing list other names scarcely less distinguished might be added; but our limits will permit the mention of only a few. Stypmannus published his 'Jus Maritimum' in 1652; Kuricke published his 'Jus Maritimum Hanseatium' and other tracts about 1667; and the 'De Navibus et Naulo' of Franciscus Roccus was first published at Naples in 1655. All the writings of Roccus are regarded as works of great merit. The first mentioned of his treatises has been translated into English by J. R. Ingersoll of Philadelphia, and was published in 1809. Leo von Aitzema is the author of a valuable chronological sketch of events from 1621 to 1668, continued by L. Sylvius to the peace of Ryswick, 1697. It is entitled 'Saken van Stæt en Oorlagh' (Matters of State and War). John Joachim Zentgravius, professor at Strasburg, wrote, about 1678, a work entitled 'De Origine, Veritate et Obligatione Juris Gentium,' in which he maintained, against Puffendorf, the existence of a *positive law of nations*. Several writers on civil law of this period have also discussed ques-



tions of international jurisprudence, and especially cases of conflict of laws. Of these we may mention the 'Lois Civiles' of Domat, first published in 1687; 'Prælectiones Juris Civilis' of Huber, published in 1686-1699; and the 'Commentarius ad Pandectas' by the younger Voet (John), published in 1698. Wiseman's 'Excellence of the Civil Law' was published in London in 1686.

*Sixth Period—From the Peace of Utrecht to the End of the Seven Years' War, 1713-1763.*

§ 19. The peace of Utrecht was followed by the maritime war between England and Spain in 1739, which extended to France in 1744; by the continental war which grew out of the disputed question of the Austrian succession: the reigning houses of Bavaria, Saxony, Spain, Sardinia, and Prussia, on the death, in 1740, of Charles VI. (the last male descendant of the house of Hapsburg), all claimed, under various pretexts, the entire or considerable portions of the dominions which had so long been united under the Austrian sceptre; and by the Seven Years' War which Prussia waged against the combined forces of Austria, France, and Russia. This protracted and unequal struggle served to develop the military resources of Prussia and to display the brilliant genius of the Great Frederick. These wars were simultaneously terminated by the treaties of Paris and Hubertsburg in 1763.

§ 20. During this period the celebrated question of the Silesian loan gave rise to important discussions on topics of international law, more especially with reference to belligerent rights, and the effects of a declaration of war upon international obligations previously contracted. Great changes were also made during this period in the maritime laws of nations, as regulating their commercial intercourse both in peace and war. France approximated her maritime rules more nearly to those of the 'Consolato del Mare,' while Great Britain attempted to establish the doctrine which has since been denominated the 'Rule of 1756,' and, as subsequently extended and applied, the 'Rule of 1793,' of subjecting to capture in time of war any neutral commerce which is not open in time of peace. Many questions relating to precedence and etiquette and to the rights and privileges of public ministers, growing out of the increased intercourse of nations, were

also discussed during this period. However vain and frivolous some of these contests may now appear, they must, nevertheless, be regarded as evidence of an increasing respect for the equality and independence of sovereign States.<sup>1</sup>

§ 21. This period was prolific in writers on international law, or on questions intimately connected with this branch of public jurisprudence. Among the most distinguished of these writers we may mention the names of Bynkershoek, Wolfius, Vattel, Montesquieu, Heineccius, Barbeyrac, Mably, Emerigon, Valin, Burlamaqui, Pothier, Casaregis, Real, Rutherford, Tindall, Hubner, Abreu, and Dumont.

Cornelius van Bynkershoek was born at Middelburg, in Zeeland, in 1673, and died in 1743. His treatise, entitled 'De Dominio Maris,' was first published in 1702, but the greater part of his works were written after the peace of Utrecht. His celebrated 'Quæstiones Juris Publici' were published in 1737. He was the most distinguished public jurist of his age, and his works are still referred to as authority on many points. It must be remarked, however, that he attempted to revive the ancient severities of war with respect to the person and property of an enemy, and this portion of his writings not only differs from Grotius, Puffendorf, and others who preceded him, but is rejected by nearly all who have followed him. Christian Frederick Wolf, or Wolfius, as he is usually called, was born at Breslau in 1679, and died in 1754. His treatise called 'Jus Gentium,' being an abridgment of his great work in nine volumes, was published in 1749. A French translation, by M. Formey, was published in 1758, under the title of 'Principes du droit de la Nature et des Gens.' He was the first to distinguish the law of nations from that part of natural jurisprudence which treats of the rights and duties of individuals. Emmer de Vattel was born in the principality of Neufchâtel in 1714, and died in 1767. His treatise, 'Droit des Gens,' published in 1748, was based on the work of Wolfius, but was a great improvement on the original. Although justly characterized by Mackintosh as a 'diffuse, unscientific, but clear and liberal writer,' and although a large portion of his treatise on the law of nations is taken up with the discussion of questions which do not properly belong to the subject, he is never-

<sup>1</sup> See vol. ii. pp. 333-338; Lord Liverpool, *Discourse, etc.*; Martens *Causes Célèbres du Droit des Gens*, tom. ii.



theless referred to as an authority, even at the present day, by judges, diplomatists, and statesmen, more often, probably, than any other writer, not even excepting Grotius. The celebrated French philosopher, Baron Charles de Secondat Montesquieu, published his treatise, entitled '*L'Esprit des Lois*,' the same year, 1748, that Vattel published his work on international law. He was born in 1689, and died in 1755. Johannes Gottlieb Heineccius was born at Eisenberg in 1680, and died in 1741. Mackintosh said he is 'the best writer of elementary books with which I am acquainted.' His work on international law, entitled '*Elementa Juris Naturæ et Gentium*,' was first published in 1738. Jean Barbeyrac was born at Beziers, in 1674, and died in 1747. He is best known by his translations into French of the works of Grotius, Puffendorf, and Bynkershoek, to which he added very valuable notes. The Abbé Gabriel Bennot de Mably was born at Grenoble in 1709, and died in 1785. Being refused permission to publish in France, his treatise, entitled '*Droit Public de l'Europe*,' first appeared in Holland in 1746. Balthazar Marie Emerigon was born in Provence in 1716, and died in 1784. Besides his great work on maritime law, entitled '*Traité des Assurances*,' he wrote commentaries on parts of the Ordinances of 1681. René Josué Valin was born at Rochelle in 1695, and died in 1765. His '*Commentaire sur l'Ordonnance*' was published in 1760, and his '*Traité des Prises*' in 1763. J. J. Burlamaqui, an Italian by birth, and Professor of Natural and Civil Law at Geneva, published in 1747 his admirable elementary work, entitled '*Droit Naturel et Politique*.' This work was republished in 1810, under the title of '*Principes du Droit de la Nature et des Gens*,' with notes by De Felice and Dupin. Robert Joseph Pothier was born at Orleans in 1699, and died in 1772. He was the author of several law treatises which are of the highest authority, and has discussed some of the laws of war, and particularly those of maritime capture, in his '*Traité de Propriété*.' J. L. Maria de Casaregis, author of a treatise on maritime law, entitled '*Discursus Legales de Commercio*,' was born at Genoa in 1670, and died in 1737. Gaspard de Real's work, entitled '*La Science du Gouvernement*,' the fifth volume of which treats on international law, was completed in 1764, though begun at a much earlier period. Thomas Rutherforth (born in 1712, and died in 1771), published in

London, in 1754, his commentaries on Grotius, entitled 'Institutes of Natural Law.' Mathew Tindall (born in 1657, and died in 1733) published his 'Essay concerning the Laws of Nations,' in London, in 1734. Martin Hubner (born in 1725, and died in 1795), published his 'Essai sur l'Histoire du Droit Naturel,' in London, in 1757, and his treatise, 'De la Saisie des Bâtimens Neutres,' at La Haye, in 1759. Joseph Antonio de Abreu y Bertodano published at Madrid, in 1740, his 'Coleccion de los Tratados de Paz, Alianza, Neutralidad,' etc., beginning in 1598 and extending to 1700. A continuation of this work to 1736 was published in 1796. An abridgment was also published about that time, entitled 'Prontuario de los Tratados de Paz,' etc. Felix Joseph Abreu published at Cadiz, in 1746, a valuable treatise on prizes, entitled 'Tratado Juridico-Politico sobre las Presas.' A French translation of this work was published in 1758, and another in 1802, with notes by Bonnermain. A most valuable collection of treaties and diplomatic papers was made during this period by Jean Dumont, Baron de Carelscoon. The first four volumes of this work were published in 1726, under the title of 'Corps Diplomatique.' Dumont died in 1727, but four other volumes prepared by him were published after his death by Rousset, who subsequently added a supplement of several more volumes.

*Seventh Period—From the Seven Years' War to the French Revolution, 1763-1789.*

§ 22. One of the most important events which occurred in the history of Europe, between the peace of Paris and Hubertsburg, 1763, and the French Revolution, 1789, was the partition of Poland, or rather the three partitions of that kingdom. The first of these was made in 1772, the second in 1793, and the third, by which the remaining territories of unfortunate Poland were absorbed by Austria, Prussia, and Russia, took place in 1795. The war of Bavarian succession, which occurred in 1778, was terminated by the peace of Teschen, under the mediation and guarantee of France and Russia, in 1779. This was followed by the mediation of France between the Emperor Joseph II., and the United Provinces, in the question of the free navigation of the river Scheldt, which was settled by the treaty of Fontainebleau, in 1785. In 1788



Prussia interfered in the internal affairs of Holland in favour of William V., and with an army under the Duke of Brunswick, overthrew the liberal party, and restored the Stattholder to the plenitude of his authority, which was guaranteed by the triple alliance of 1788 between Great Britain, Prussia, and Holland. This triple alliance interfered between the Emperor Joseph II., of Austria, and his revolted subjects in Belgium, at the Congress of the Hague, in 1790, forcing the latter to submit to the imperial authority. The same powers compelled Denmark to withdraw the co-operation she had furnished Russia against Sweden in 1788, and the war was terminated by the peace of Werela, in 1790. The wars between Austria and the Porte, and Russia and the Porte, were also terminated under the mediation of the triple alliance, the former by the treaty of Szistowe, in 1791, and the latter by the treaty of Jassy, in 1792. But the most important event of this period was the revolt of the British provinces in North America, and the war of the American Revolution, in which France afforded material aid to the revolutionary party. This war was terminated by the treaty of Versailles, in 1783, by which Great Britain recognised the independence of her revolted colonies, and the United States of America took their place as a sovereign State among the nations of the world.<sup>1</sup>

§ 23. The more important questions of international law, agitated during this period, were those in reference to the rights of sovereignty and independence, arising out of the partition of Poland and the Bavarian succession; the right of mediation, arising out of the interference of the triple alliance in the wars of Russia, Austria, Sweden, Denmark, and the Porte; the right of intervention, arising out of the interference of Prussia in the affairs of Holland, and of the triple alliance in the affairs of Belgium; and the right of revolution, arising out of the revolt of the British provinces of North America. Important questions of maritime jurisprudence were also agitated during this period, such as the rule of *free ships free goods*, which was recognised and attempted to be established by the French Ordinance of 1778; the rights of neutral commerce, declared by the armed neutrality of 1780; and the abolition of privateering, as agreed upon by Prussia and

<sup>1</sup> Ompteda, *Literatur und Völkerrecht*; Grahame, *History of the United States*; Bancroft, *History of the United States*.

the United States in the treaty negotiated by Franklin in 1785.<sup>1</sup>

§ 24. The most distinguished writers of this period, on questions of international law, were the Mosers, Lampredi, Galiani, Martens, Mirabeau, and Bentham.

John Jacob Moser (born in 1701, and died in 1785) first published a small work on international law in 1750; but the publication of his larger and more celebrated work in ten volumes, under the title of 'Essay on the Modern Law of European Nations' (*Versuch des Neuesten Europäischen Völkerrechts*), was commenced in 1777 and completed in 1780. He bases the principles of the law of nations on treaties and usages, and contends that the rules of that law must be inferred from examples, and cannot be applied *à priori* to test the validity of a particular precedent. His supplementary work, entitled 'Beiträge zu dem Europäischen Völkerrecht,' of which seven volumes had been published in 1781, was never completed. F. C. de Moser published his 'Kleine Schriften,' in twelve volumes, in 1751, and his 'Beiträge zu dem Europäischen Staats- und Völkerrecht,' in four volumes, in 1772. Gio M. Lampredi, an Italian (born in 1761, and died in 1836), published at Leghorn, in 1778, his 'Juris Naturæ et Gentium,' in which he incidentally considered questions relating to the rights of belligerents and neutrals. This work was severely criticised by the Abbé Galiani. In 1788 he published, at Florence, another work, entitled 'Commercio dei Popoli Neutrali in tempo di Guerra,' in which he returned the compliment by criticising the work of the Abbé. This latter work, entitled 'Dei Doveri dei Principi Neutrali,' etc., was first published at Naples, in 1782. Its author, the Abbé Fernando Galiani, was born in 1728, and died in 1787. Lampredi's second work was translated into French by Jacques Peuchet, and published at Paris in 1802, under the title of 'Du Commerce des Neutres en temps de Guerre.' George Frederick von Martens was born at Hamburg in 1756, and died in 1821. A syllabus of his lectures at the University of Göttingen, on international law, was first published in 1785, but this work was afterwards enlarged, and published in French in 1788, under the title of

<sup>1</sup> Wheaton, *Hist. Law of Nations*, pp. 269-328; Franklin, *Life and Works*, vol. ii. p. 448; Russell, *Hist. Mod. Europe*, vol. iii.; Rotteck, *Hist. of the World*, vol. iii.; Sparks, *Dip. Cor. of the American Revolution*; Pitkin, *Civil and Pol. Hist. U. States*.



'Précis du Droit des Gens Moderne de l'Europe.' The subsequent works of Martens will be noticed in another place. Count Honoré Mirabeau was born in 1749, and died in 1791. His work on the Prussian Monarchy, and his speeches on great national questions during the early part of the French Revolution, have given a world-renown to his name. In his work, entitled 'Doutes sur la Liberté de l'Escaut,' he most ably defended the cause of Holland in the question of the free navigation of the Scheldt, which was settled by the treaty of Fontainebleau in 1785. Jeremy Bentham was born in 1749, and died in 1832. His essay on international law was written at various dates between 1786 and 1789, but he never completed the work, these fragments being published at a later period. His plan for a perpetual and universal peace, although utterly impracticable, has formed the basis of numerous peace societies in England and the United States.

In addition to the foregoing list of distinguished authors, we will briefly refer to a few others who have written on this subject. J. J. Neyron published, in 1783, a small work on the principles of the law of nations, which was followed by others. Charles T. Gunther published, in 1777, an anonymous work on this subject, which was followed, in 1787 and 1792, by the first and second volumes of his 'Europäisches Völkerrecht in Friedenszeiten' (European law of nations in time of peace), a work which he did not live to complete. C. H. van Romer published his 'Völkerrecht der Deutschen' in 1789, at Halle. Frederick Aug. William Wench published the first volume of his 'Codex Juris Gentium Recentissimi' in 1781, and the third in 1796. Schmass published, in 1774, his 'Corpus Juris Publici Academicum, which was augmented by Hommel in 1794. We must not conclude this list of writers on international law without mentioning the name of Benjamin Franklin, the American statesman and philosopher, who wrote against privateering, and was the negotiator of the treaty of 1785, between the United States and Prussia, for its suppression. He was born at Boston in 1706, and died in 1790.

*From the Beginning of the French Revolution to the Congress of Vienna, 1789-1815.*

§ 25. The conflict of opinions and interests growing out of

the events of the French Revolution engendered a war which ~~was~~ involved nearly all the nations of Europe, and finally embraced in its tortuous folds the sparsely populated continent of America. It is not necessary to particularise here each separate declaration of war, or to notice the cause which produced it and the treaty by which it was suspended or finally terminated. This contest had its origin in a violation of the rights of independent and sovereign States, by the armed intervention of the allies in the internal affairs of France, on the one side, and by the efforts of the French propagandists, on the other, to revolutionise the governments of other countries. The whole period—from 1789 to 1815—is marked by encroachments on the true principles of international law, and a total disregard of the rights of the smaller States was manifested by the treaties of Paris and Vienna, by which the peace of Europe was restored. The war of 1812 between the United States and Great Britain originated in violations of the maritime law of nations, by the capture and confiscation of American vessels engaged in neutral trade, and the impressment of American seamen on the high seas, under the pretext of exercising the right of search for British subjects by virtue of the municipal laws of Great Britain.<sup>1</sup> This war was terminated by the treaty of Ghent, in 1814, on the basis of the *status quo ante bellum*, leaving undecided the questions in which it originated.<sup>2</sup>

§ 26. The political discussions of this period embraced almost the entire range of diplomacy, and questions were agitated respecting nearly every established principle of the law of nations. Among those of most interest we may mention the right of armed intervention in the internal affairs of independent sovereign States, growing out of the French Revolution in 1789; the rights of war with respect to private property on land, including booty, pillage, and military contributions; the rights of military occupation and conquest; the law of sieges and blockades; the treatment due to prisoners of war, with the right and duty of exchange; and the general rules which should regulate the pacific

<sup>1</sup> See vol. ii. pp. 300–303.

<sup>2</sup> Wheaton, *Hist. Law of Nations*, pp. 345, 425; Mackintosh, *Miscel. Works*, pp. 461–465; Jomini, *Les Guerres de la Révolution*; Jomini, *Vie Pol. et Mil. de Napoléon*; Alison, *Hist. of Europe*, first series; Armstrong, *Notices of the War of 1812*.

intercourse of belligerents. The controverted questions of maritime law included almost every right of neutral commerce; the term contraband of war was extended to include nearly everything in which a neutral could trade with profit; whole coasts were blockaded by mere decrees and orders in council; colonial and coasting trade was closed to neutrals, their vessels were searched, and their seamen impressed, in virtue of merely local and municipal laws. In fine, every imaginable pretext was resorted to in order to destroy the commerce of neutral States, or to force them to abandon their neutrality and join the dominant maritime power of Europe, which sought, and almost acquired, the entire control of the seas.<sup>1</sup>

§ 27. This was eminently a period of action and of great events, rather than of calm discussion and philosophical investigation. Although questions of international law were frequently discussed with learning and ability in diplomatic correspondence and state papers, the works of professed text-writers on this branch of jurisprudence were neither very numerous nor of a very marked character. Nevertheless, there were published, during this period, a number of works worthy of particular notice, and among the authors who wrote or published at this time, we may mention Azuni, Martens, Kant, Koch, Savigny, Ward, Mackintosh, Dou, Flassan, Rayneval, etc.

Domenico Alberto Azuni, a native of the island of Sardinia (died 1827), published his 'Sistema Universale dei Principii del Diritto Marittimo dell' Europa' in 1795; but the work was afterwards remodelled and enlarged, and published in French in 1797, under the title of 'Droit Maritime de l'Europe.' A translation, by Mr. Johnson, was published in New York, in 1806. George Frederick von Martens, who has already been mentioned, published during this period several important works connected with diplomacy and the treaties celebrated between the different States of Europe. The great German philosopher, Emanuel Kant (born 1724, died 1804), as a writer on international law, properly belongs to this period, although a portion of his works were published at an earlier date. That part of his works relating to the law of nations was translated into French and published in Paris

<sup>1</sup> Napoleon, *Memoirs dictated at St. Helena.*



in 1814, under the title of '*Traité du Droit des Gens.*' Like Bentham, he advocated a project of perpetual peace, founded upon a confederation of free States. His principles have been ably contested by Hegel. Christopher G. Koch, a native of Alsace (born 1737, died 1813), published, in 1796, his '*Abrégé de l'Histoire des Traités de Paix.*' This was followed by other historical collections. Frederick Charles Savigny, a native of Frankfort-on-the-Maine (born 1779), belonged to what is called the historical school of German lawyers. His work on the '*Law of Possession*' was written in 1803, but his '*History of the Roman Law in the Middle Ages*' was not published till 1815. All his writings are rather of a historical than a philosophical character. Robert Plummer Ward, an English author (born 1765, died 1846), published, in 1795, his '*History of the Law of Nations in Europe,*' from the time of the Greeks and Romans to the time of Grotius; it is a work of great ability. Sir James Mackintosh, another English writer of note, delivered a course of lectures in 1797, in Lincoln's Inn Hall, on the '*Law of Nature and Nations;*' but the subject being unattractive to an English auditory, only the '*Introductory Discourse*' was published. It is found in his '*Miscellaneous Works,*' and contains an admirable review and criticism of the works of other publicists. Don Ramon Lázaró de Dou y de Bassols, a Spanish author, published, in 1802, his work entitled '*Instituciones del Derecho Público General.*' J. M. Gérard de Rayneval, a native of Alsace (born 1736, died 1812), first published his work, entitled '*Institutions du Droit de la Nature et des Gens,*' in 1803. M. de Flassan, a native of France, published, in 1811, his '*Histoire générale de la Diplomatie Française,*' and in 1814, his '*Histoire du Congrès de Vienne.*' Thomas Hartwell Horne, an English author, published, in 1803, a '*Compendium of Admiralty Decisions,*' and, subsequently, a '*Treatise on Diplomacy.*' J. Jouffroy published, in 1806, his '*Droit des Gens Maritime Universel.*' F. J. Jacobson published, in 1804, his '*Handbuch über das praktische Seerecht,*' etc., and, in 1815, his work, entitled '*Seerecht des Kriegs und des Friedens,*' etc. A translation of this work, by William Frick, was published, in Baltimore, in 1818. J. N. Tetens published, in 1805, a work on the reciprocal rights of belligerents, and, in 1811, Count Merlin published his valuable

'Répertoire,' which has since been greatly enlarged. De Steck published, in 1790, his 'Essay sur les Consuls.' Warden, United States Consul General in France, published, in 1815, a valuable work on the same subject, which was translated into French by Barrère. John E. Hall published, in Baltimore, in 1809, a treatise on 'Admiralty Practice,' in which he embodied a translation of Clerke's 'Praxis,' which was first published in Latin, in 1679. Robinson published his 'Collectanea Maritima,' in London, in 1801. Marin published his 'Derecho Natural y de Gentes,' in 1800.

§ 28. But any deficiency in the number and character of professed writers on public law during this period is more than compensated for by the decisions of judicial tribunals on questions of international law, and more particularly of the maritime law of nations, the opinions delivered by the judges being often characterized by profound learning and great legal ability. Of the English judges of Admiralty and prize, Sir William Scott, afterward Lord Stowell, was unquestionably the most able and the most distinguished. Mr. Duer very justly remarks: 'In the same sense in which Lord Mansfield is usually termed the father of commercial law in England, Sir William Scott may be justly regarded as the founder of the law of maritime capture. Its principles, it is true, had been stated by the great writers on public law—Grotius, Puffendorf, Vattel, and Bynkershoek—but they were stated in terms so loose and general, as rendered them too liable to be differently understood and applied by different nations. It is, by a series of judicial decisions, in the prize-courts of England and of the United States, and principally by those of Sir William Scott, that these principles have been rendered clear, definite, and stable; by their extended application, in practice, have been rescued from the domain of theory, and by successive elucidations and varied illustration, have been expanded and wrought into a consistent, harmonious, and luminous system. The opinions of Sir William Scott, the chief architect of this noble structure, are those, not merely of a jurist, but of a scholar, philosopher, and statesman; and they are as much distinguished by the beauties of their composition, as by their sagacity and learning, and comprehensive views.'<sup>1</sup>

<sup>1</sup> Duer, *On Insurance*, vol. i. pp. 746, 747; Manning, *Law of Nations*, pp. 45-47; Hoffman, *Legal Studies*, vol. ii. pp. 458 et seq.



*Ninth Period—From the Congress of Vienna to the Treaty of Washington, 1815–1842.*

§ 29. Europe, exhausted by the great wars of the French Revolution and Empire, which were terminated by the treaties of Paris and Vienna, in 1814 and 1815, enjoyed a long period of general peace, interrupted only by the internal revolutions of Greece, France, Belgium, Poland, etc., and the war between Russia and the Porte, which was terminated by the treaty of Adrianople in 1829. These wars, however, were too limited in their extent and too temporary in their character to disturb the general tranquillity of nations. The lessons of the past had taught the Allies, and particularly Great Britain, the impolicy of dictating to others the form and character of their government, or the person of their ruler, and when France, in 1830, revolted and dethroned her king, again exiling the Bourbons whom the Allies had forced her to receive in 1815, she was permitted to form her own government and select her own sovereign without molestation or foreign interference. The same regard for the principles of international law, and the rights of sovereign States, was not shown in some other cases: but the right of intervention in the internal affairs of other States, where not justified or required by existing treaties, was not only not claimed, but expressly denied by British statesmen. In America, during this period, the Spanish and Portuguese provinces, following the example of their northern neighbours, revolted against the governments of the mother countries, and, after a contest of many years, succeeded in establishing their independence, and assumed the position and rank of sovereign States. The United States, profiting by the long peace to people her wide domain by European immigration, and to build up her commercial marine by unrestricted trade with other countries, rapidly became a formidable rival to the great maritime powers of Europe. But the treaty of Ghent had left undecided the important questions which had been involved in the war with Great Britain in 1812, and new causes of difficulty were continually arising between the two countries. The latter forbore, it is true, any attempt to visit and search American ships for her own seamen, but claimed the right to *visit* such vessels on the high seas in order to determine their character

and ascertain if they might not be engaged in the slave trade. Moreover, the dispute with respect to the north-eastern boundary, and the capture and destruction of the 'Caroline' on the Canadian frontier by British forces, within American territorial jurisdiction, so involved the relations of the two countries, and so embittered the feelings of both nations, that war seemed almost inevitable. But cooler and wiser counsels prevailed, and most of these points of dispute were happily settled by the treaty of Washington in 1842.<sup>1</sup>

§ 30. The more important questions of international law, agitated during this period, were the right of armed intervention, as in the case of Naples, Spain, Greece and Belgium; the right of forcible annexation, as in the case of the kingdom of Poland; the internal and external rights of confederated States, as in the case of the Germanic and Swiss Confederations; the rights of sovereign and independent States to change their government, as in the case of France, Belgium, etc.; the free navigation of great rivers which divide or run through different States, as the Rhine, the St. Lawrence, the Mississippi, etc.; the right of territorial jurisdiction over inland waters, as the Black Sea, the Dardanelles, the Bosphorus, etc.; the right of colonial revolution and independence, as in the case of Mexico and the Spanish and Portuguese provinces of South America; the right of visitation on the high seas in time of peace to search for slavers; and the inviolability of neutral territory, as in the case of the destruction of the steamer 'Caroline' by British forces within the territorial jurisdiction of the United States. Another question agitated during this period, and most warmly discussed in the British Parliament, was the right of the people of one State to assist, in time of peace, the insurgent colonies of another State. This question arose with respect to the expeditions fitted out in England in aid of the insurgents of Spanish America—expeditions similar in character to those which in the next period were organised in the United States, and generally known as 'filibuster expeditions.' Laws were passed, nominally to prohibit them, but these laws were a mere dead letter upon the statute-books. In addition

<sup>1</sup> Alison, *Hist. of Europe*, second series; Capefigue, *Hist. de la Restauration*; Capefigue, *L'Europe depuis l'avènement du roi Louis-Philippe*.



to the men, arms, and munitions of war furnished by Great Britain, it is estimated that she advanced, in loans to the revolutionary governments of South America, between 1820 and 1840, the sum of one hundred and fifty million pounds sterling, nearly all of which was lost by the faithlessness and insolvency of the governments and States which received it. The entire loss of Great Britain by these advances, and the reaction produced thereby in 1825, is estimated at three hundred million pounds sterling, or fifteen hundred millions of dollars! Moreover, the export trade from Great Britain to America (exclusive of the United States), which, in 1809, before these revolutions began, was eighteen million fourteen thousand two hundred and nineteen pounds, had sunk, in 1827, to one million two hundred and ninety thousand pounds, and even, in 1842, had only reached two million three hundred thousand pounds! 'Such,' says Alison, 'have been the effects, even to the immediate interests of England, of her iniquitous attempt to dismember, by insidious acts in peace, the dominions of a friendly and allied power! Providence has a just and sure mode of dealing with the sins of men, which is, to leave them to the consequences of their own actions.' That the aids thus afforded by Great Britain, or rather, by the people of Great Britain—for the government pretended to discountenance and oppose it—were in direct violation of the plainest maxims of international law, no one will venture to deny. In this case at least, punishment followed close upon the commission of the crime!<sup>1</sup>

§ 31. Among the authors of this period who have treated of matters connected with international law, we may mention the names of Kamptz, Kluber, Hegel, Wheaton, Kent, Story, Manning, Bello, Pfeiffer, C. D. Martens, Garden, Pardessus, etc.

C. A. von Kamptz published at Berlin, in 1817, his '*Neue Literatur des Völkerrechts*.' It is a continuation of the work of Ompteda, and the two form a valuable history of the law of nations. Jean Louis Kluber (born 1762, died 1837) first published his '*Droit des Gens Moderne de l'Europe*,' in 1819;

<sup>1</sup> Wheaton, *Hist. Law of Nations*, pp. 425-758; Alison, *Hist. of Europe*, ch. lxvii. §§ 47-91; Alison, *Hist. of Europe*, second series, ch. iv. §§ 103-106. But see the British Foreign Enlistment Act, 1870, post, ch. xiii., also vol. ii., pp. 185-203.



a German edition, entitled 'Europäisches Völkerrecht,' was published in 1821, and an enlarged edition of the French work, in 1831. Kluber was the author of numerous other works connected with international jurisprudence. George William Frederick Hegel, a native of Stuttgart (born 1770, died 1831), was the author of a number of works on philosophy and law, in one of which he most ably refutes the political theories of Kant. His 'Elements of Right, or the Basis of Natural Law and Political Science (Grundlinien des Rechts, oder Naturrecht und Staatswissenschaft in Grundrisse),' was published at Berlin in 1821. Henry Wheaton, an American author (born 1785, died 1848), published the first edition of his 'Elements of International Law' in 1836. This work was afterward greatly enlarged and improved. He had previously written on the 'Law of Captures,' and subsequently he published several important works on international jurisprudence. James Kent, another American writer (born 1763, died 1847), published, in 1826, the first volume of his 'Commentaries on American Law,' which briefly, but most ably, discusses the fundamental principles of international law; the entire work was not completed till 1830. Joseph Story, one of the Justices of the Supreme Court of the United States (born 1779, died 1845), published, in 1834, his 'Commentaries on the Conflict of Laws,' in which he examines many important questions of international jurisprudence. William Oke Manning, an English author, published, in 1839, his excellent work, entitled 'Commentaries on the Law of Nations.' Andrés Bello, a native of Venezuela, published, in 1832, in Chili, a valuable and able elementary work, entitled 'Principios del Derecho Internacional.' B. W. Pfeiffer published, in 1819, his 'In wiefern sind Regierungshandlungen,' etc., and in 1823-1841, his 'Das Recht der Kriegseroberung,' etc. These works are valuable for containing learned discussions of certain questions not treated of in other modern works on public law. Charles de Martens published his 'Manuel Diplomatique,' in 1822, his 'Causes Célèbres du Droit des Gens,' in 1827, and his 'Guide Diplomatique,' in 1832. He is also the author of several other works. Count de Garden published his 'Traité Complet de Diplomatie' in 1833. J. M. Pardessus commenced, in 1828, the publication of his 'Collection de Lois Maritimes,' but the entire work was

not completed till 1845. The first of two volumes was subsequently published separately, under the title of 'Us et Coutumes de la Mer.' P. S. Boulay-Paty published, in 1821-3, his 'Cours de Droit Commercial Maritime.' Count d'Hauterive and Baron de Cussy began, in 1834, the publication of their 'Recueil des Traités de Commerce.' Professor de Felice published, in 1830, his 'Leçons de Droit de la Nature et des Gens.' Professor Cotelle published, in 1819, a volume, entitled 'Droit de la Nature et des Gens.' Frederick Salfield published, in 1833, his 'Handbuch des positiven Völkerrechts,' an elementary work of considerable merit. The posthumous work of G. de Wal, entitled 'Inleidning tot de Wetenschap van het Europeesche Volkeregt,' was published in 1835. M. Shafner's work, on the Development of Private International Law (Entwicklung des Internationalen Privatrechts), was published in 1841. H. Ahrens's 'Cours de Droit Naturel' was first published in 1840; it soon passed through several editions, and was translated into various languages. M. S. F. Schoel published, in 1817 and 1818, his 'Histoire Abrégée des Traités de Paix.' Laget de Podio published, in 1826, his 'Jurisdiction des Consuls de France.' Borel published, in 1831, an enlarged edition of his work, entitled 'De l'Origine et des Fonctions des Consuls,' which originally appeared in Russia in 1807. The fourth volume of Alexander de Miltitz's 'Manuel des Consuls' appeared in 1839; the death of the author prevented the completion of the work. José Ribiera dos Santos and José Feliciano de Castilho-Barreto published, in 1839, a valuable work in two volumes, entitled 'Traité du Consulat.' Schmolz published, at Berlin, in 1817, his 'Europäisches Völkerrecht.' Gagern published, at Leipsic, in 1840, a work, entitled 'Critik des Völkerrechts.' Mirus published, at the same place, in 1838, his work, entitled 'Das Seerecht,' etc. 'Pitkin's Political and Civil History of the United States' was published in 1828.

Some of the historical writers of this period, in describing the political events of that which preceded, have discussed, incidentally, but with marked ability, some of the great questions of international law which grew out of the memorable wars following the French Revolution. Among the historical writings of this character, we may mention those of Baron Jomini, Mathieu Dumas, Foy, Thiers, Clausewitz,



Koch, Burlow, the Archduke Charles, Napier, Pelet, Guvion Saint-Cyr, Suchet, etc. The 'Mémoires' dictated by Napoleon at St. Helena to Gourgaud, Montholon and others, contain many striking remarks upon questions of international law which had been agitated in Europe during his reign.

*Tenth Period—From the Treaty of Washington to the Civil War in the United States, 1842-1861.*

§ 32. Among the most important events which occurred in Europe during this period, we may mention the revolution in France, which resulted in the expulsion of the younger house of the Bourbons, the restoration of the family of the Bonapartes, and the establishment of the imperial government of Napoleon III.; the abortive attempts at insurrection and revolution in Italy; the revolt in Hungary and the complete subjugation and absorption of that nation by Austria, through the assistance and armed intervention of Russia; the Crimean war between Russia on one side, and France, Great Britain, Sardinia and the Porte on the other; the Italian war between Austria and the allied forces of France, and Sardinia, and its appendix, the revolution and consolidation of Italy.

The wars waged by France in Africa, by Russia in Asia, by Great Britain in India, and by France and Great Britain in China and Syria, and by Spain against Morocco, do not properly come within the limits of this historical sketch. In America the most noted events were the revolt of Texas from Mexico and its voluntary annexation to the United States, and the war which resulted therefrom between the two republics. This war was terminated by the treaty of Guadalupe Hidalgo in 1848, by which Mexico ceded to the United States a large portion of her territory. The restoration of peace was followed by the disbanding of large bodies of undisciplined troops, whose restless spirits, under the leadership of designing and unprincipled men, sought occupation in the lawless and disastrous expeditions, which were fitted out in different parts of the United States against Cuba, Lower California, Sonora and Nicaragua, generally known by the name of *Filibuster Expeditions*.<sup>1</sup>

<sup>1</sup> Presidents' Messages and Congress Documents on the War with Mexico.

§ 33. The more important questions of international law agitated during this period in America were, the right of jurisdiction over arms of the sea, arising out of the fishery question on the north-eastern coast adjacent to the British and American possessions; the rights of secession and annexation, as in the case of Texas; the rights of military occupation and of conquest, as in the case of Mexican ports and in territories possessed by, and ceded to, the United States; the rights of neutrality and of embassy, as in the case of British enlistments in the United States, and the consequent dismissal of the British minister and consuls; the character of unauthorised military expeditions by citizens of one State against those of another, when the governments of the two countries are at peace with each other, as in the case of the various filibuster expeditions upon Cuba, Mexico, and Central America; the proposed treaty for the protection of Cuba, and a guarantee by Great Britain, France, and the United States, of the *status quo* in the West Indies; thus introducing into America the principle of supervision, intervention, and balance of power, which now prevails in Europe; and the right of intervisitation of ships on the high seas in time of peace, for the suppression of the slave trade.<sup>1</sup>

§ 34. The questions of international law most agitated during this period in Europe were those respecting the right of armed intervention by one State in the internal affairs of another, arising out of the revolutions in France, Italy, Germany and Hungary; the preservation of the balance of power in Europe, arising out of the encroachments of Russia upon the territory of the Ottoman Porte, and her manifest intention to enlarge her dominions by the absorption of Turkey; and similar encroachments of Austria in Italy; the law of sieges and blockades, the rights and duties of neutrals, the question of contraband, of neutral goods in enemy ships, and of enemy goods in neutral ships, arising out of the war of the Crimea between Russia and the Western Powers; the right of foreign enlistment in neutral territory and the rights and duties of embassy, as in the case of the British

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. pp. 465, 466; Marcy, *Dip. Correspondence*, Cong. Docs.; Everett, *Letter of Dec. 1st, 1852*, Cong. Docs.; President's Messages, Dec. 1856-57-58; Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 3, note.



minister and consuls in the United States, and of the British minister in Spain; the abolition of privateering, and the general policy of changing the conventional law of nations with respect to maritime capture, so as to conform to the modern rules of war upon land, as proposed by the United States to the maritime States of Europe; the rights of belligerents on land, and of conquest, as in the Italian war, and the cession to France and transfer to Sardinia of Lombardy; and the rights of other sovereign and dependent States of Italy, as connected with the right of intervention and the equilibrium of power in Europe.<sup>1</sup>

§ 35. The present period has been exceedingly prolific in works which are professedly devoted to international law, or which treat of subjects connected with that branch of legal science. We will proceed to mention some of the more important of these publications.

Henry Wheaton published, in 1842, his essay on the 'Right of Visitation and Search,' and, in 1845, his 'History of the Law of Nations,' based on a memoir previously published in French, and submitted to the Institute of France. James Reddie published, in 1842, his 'Inquiries in International Law,' and, subsequently, his 'Researches, Historical and Critical, in Maritime International Law.' Archer Polson, in 1848, published a work entitled 'Principles of the Law of Nations.' Richard Wildman published, in 1849, a valuable work entitled 'Institutes of International Law.' John Westlake published, in 1858, a most excellent 'Treatise on Private International Law.' Wm. Beach Lawrence published, in 1855, an edition of Wheaton's 'Elements of International Law,' with introductory remarks and valuable notes, and in 1859, an essay or historical sketch of the right of 'Visitation and Search.' Robert Phillimore published, in 1847, a valuable little work, entitled 'The Laws of Domicile,' and in 1854-6, his learned and elaborate treatise, entitled 'Commentaries of International Law.' George Bowyer published, in 1854, his 'Commentaries on Universal Public Law,' in which many questions of international law are fully discussed. Of Continental works, we may mention the following: L. B. Hautefeuille published, in 1848, his valuable work, entitled 'Droits

<sup>1</sup> Marcy, *Letter to Count Sartiges, Cong. Doc.*; Webster, *Works of*, vol. vi. pp. 488-506.

et Devoirs des Nations Neutres en temps de Guerre Maritime.' A second and enlarged edition was published in 1858. Theodore Ortolan published, in 1845, 'Règles Internationales et Diplomatie de la Mer.' Eugène Ortolan published, in 1845, 'Des Moyens d'acquérir le Domaine International.' Foelix published, in 1843, his 'Traité du Droit International Privé.' G. Massé published, in 1844, his work, entitled 'Le Droit Commercial,' etc. A. de Pistoye and Charles Duverdy published, in 1855, their elaborate work, entitled 'Traité des Prises Maritimes.' Baron Ferdinand de Cussy published his 'Dictionnaire du Diplomate et du Consul,' in 1846; his 'Réglements Consulaires,' in 1851; his 'Phases et Causes Célèbres du Droit Maritime des Nations,' in 1856; and his 'Précis Historique des Evénements Politiques,' in 1859. Louis Pouget published, in 1858, 'Principes de Droit Maritime,' and the same year, Aldrick Caumont published his 'Dictionnaire Universel du Droit Maritime.' J. Bedarride published his 'Droit Commercial' in 1859. Two Spanish works, published during this period, are worthy of particular notice. The posthumous work of José Maria de Pando, who died in 1840, was published at Madrid, in 1843, under the title of 'Elementos del Derecho Internacional,' and, in 1849, Don Antonio Riquelme published his 'Elementos del Derecho Publico Internacional.' Silvestre Pinheiro-Ferreira, a Portuguese by birth, published, in 1845, his 'Cours du Droit Public.' He was the author of numerous articles in the French *Revue Etrangère de Législation*, and of notes on Vattel and Martens. The various memoirs of Professor Putter, of the University of Griveswalde, on questions of international law, were collected and published in 1843, under the title of 'Beiträge zur Völkerrechts-Geschichte und Wissenschaft.' A. W. Heffter published, in 1844, a work on international law, entitled 'Das Europäische Völkerrecht der Gegenwart.' An enlarged edition, translated by Jules Bergson, with notes, was published, in Paris, in 1859, under the title of 'Le Droit International Public de l'Europe.' Mensch published, in 1846, his 'Manuel pratique du Consulat,' and Moreuil, in 1850, his 'Manuel des Agents Consulaires.' Alexander de Clercq published, in 1851, a 'Guide pratique du Consulat,' which was followed by a 'Formulaire des Chancelleries.' Count de Garden commenced, in 1850, the publication of his



voluminous work, entitled '*Histoire Générale des Traités de Paix.*' C. Von Kalternborn published, in 1847, a work entitled '*Critik des Völkerrechts,*' and, in 1848, another, entitled '*Zur Geschichte des Natur- und Völkerrechts.*' A. Villefort's pamphlet on '*Privilèges Diplomatiques,*' published in 1858, is a work of much merit. A French edition of the Italian work of Ferdinand Lucchesi-Palli was published in 1842, under the title of '*Principes du Droit Public Maritime.*' H. B. Oppenheim published, at Frankfort, in 1845, a manual on international law, entitled '*System des Völkerrechts.*' Mirus published, in 1847, a work, entitled '*Das Europ. Gesandtschaftsrecht.*' Gardner published, in 1860, his '*Institutes of International Law.*' Other authors of treatises on particular branches of jurisprudence,—as insurance, commercial and mercantile law,—have incidentally discussed certain questions of an international character with learning and ability. Among these we may mention '*The Law and Practice of Maritime Insurance,*' by John Duer, published in 1846, which contains a very complete summary of the decisions of the prize-courts of England and America on maritime captures.<sup>1</sup> Of the judicial opinions collected and discussed in Mr. Duer's work, there are none of more marked ability than those delivered by Chief Justice Marshall and Mr. Justice Story in the Supreme and Circuit Courts of the United States. The decisions of these two eminent judges on questions of international law, and more particularly of maritime capture, rank, at least, next to those of Sir Wm. Scott, and on some points, they are now regarded as the better authority.

§ 36. Some of the numerous and important questions of international law, which have been agitated within the last twenty years, are treated of in the text-books to which we have just referred; but many of them are scarcely alluded to, and some are not mentioned at all. We find some able and valuable discussions of various events of the Crimean and Italian wars, and of the questions to which they have given rise,

<sup>1</sup> It is proper to remark that, with regard to the dates of the births, deaths, and publications of many of the authors referred to in the foregoing pages, there are numerous conflicting statements in biographical and bibliographical dictionaries. The author has followed those which he believed the best authority, although, in a few cases, there was some cause to doubt their correctness.

in the diplomatic correspondence and parliamentary debates of the same period.<sup>1</sup> In fact, international law has been very

<sup>1</sup> The author here refers to the war, waged by Great Britain, France, and Turkey against Russia, in 1854-56, and to the wars of 1860 resulting in the unification of Italy. The former war was signalised—by the bombardment of Odessa for an insult offered to a British flag of truce; the victory of the allies at Alma; the siege of Balaklava, and the battle of that name, rendered famous by the charge of the British light cavalry, an act rather renowned for its courage than for its strategy; the battle gained by the allies at Inkermann; the defective arrangements of the British commissariat department, so badly organised that the soldiers were suffering the greatest privations, whilst food and fuel in abundance were within eight miles of them; finally the taking of the Mamelon, and of Sebastopol, from the Russian army.

Nor should the occurrence of 1857-58, so painful to the memory of thousands of Englishmen, be altogether passed by. As sudden as the Sicilian Vespers, and without warning, the terrible mutiny of the Sepoy regiments in India took place, in that period. Its true origin is difficult to be traced, but political intrigue, fanaticism of the Hindoos, and conspiracy among the Mussulmen, are known concurrent causes. The mutiny first evinced itself in the 19th Regiment, at Berhampore, with the alleged grievance that cartridges greased with animal matter had been served out to the soldiers. It is said that, had the commander-in-chief of the district displayed proper tact and energy, the mutiny might have been crushed in the bud. Be this as it may, it soon spread over the whole of Hindoostan, and the descendant of the Mogul was proclaimed Emperor of India. The atrocities committed against the Europeans, men, women, and children, were of the most frightful character, particularly at Meerut, Delhi, and Cawnpore; Nana Sahib, an adopted son of the ex-Peishwah of the Mahrattas, being one of the chief instigators of these barbarities. Fortunately the native armies of Madras and Bombay preserved their allegiance; suspected regiments were disarmed, and rebels were blown from the guns, in the presence of numbers of their accomplices. The skill and determination of the handful of European troops, assisted by those native regiments who remained faithful, finally subdued the insurrection.

In 1859, France declared war with Austria: Napoleon III. led his army in person, and gained the battles of Montebello and of Solferino. The victory of Magenta also graced the arms of the French, through the fault of the Austrian generals. The Austrian army retreated toward the famous Quadrangle, and on approaching thereto, peace was sought by France, and immediately accepted by Austria.

1860 saw the consolidation of Italy. Central Italy offered her allegiance to the King of Sardinia, Victor Emmanuel, and Florence became the new capital. The expedition of Garibaldi to Sicily, the surrender of Palermo, and capture of the whole island by his followers, are still fresh in the mind of the reader. His invasion of the Neapolitan dominions on the continent followed, ending with his victorious entry into Naples, while under the pretext of requiring the Pope to dismiss his foreign troops, the Sardinian took possession of Umbria and the Marches. The following year Victor Emmanuel was proclaimed King of Italy, a title acknowledged at once by England, afterwards by France, and by the other powers.

In 1861 the United States of America separated into two independent Republics. South Carolina, by a vote of a Convention, proclaimed her resumption of independence as a Sovereign State. Mr. Jefferson Davis,



much popularised in the present age; its principles are more generally acknowledged, and its authority is more frequently invoked by diplomatists, statesmen, and legislators. This is especially the case in the United States and Great Britain. In proof of the remark, we need only refer to the admirable State papers of the American Secretaries, Webster and Marcy,

formerly Secretary of War, was elected the first President of the Confederate States, which first consisted of South Carolina, Georgia, Alabama, Florida, Louisiana, and Texas. Other States subsequently joined them, to the number of five or six. Great Britain, in concert with France, determined to recognise both parties as belligerents, and not to regard the Confederate States as mere rebels (see *post*, vol. ii., p. 74, note), but in order to discourage privateers, all British ports were closed to prizes taken at sea. Upwards of 2,000 battles were fought. A remarkable incident of this war is the first sea-fight between iron-clad ships. The 'Virginia' (or 'Merrimac'), having been coated with iron rails by the Confederates, destroyed several wooden men-of-war of the enemy, and dispersed their transport ships. She was attacked by the 'Monitor,' an iron-clad vessel of the Federal Government, but the contest was undecided.

On May 26, 1865, the Confederate Government was entirely defeated, and the Civil War brought to a close. The British and French Governments rescinded their recognition of the Confederate States as belligerents. The United States Government granted an amnesty to the Confederates, all prisoners of whom were released on parole, after taking the oath of allegiance.

In 1864, Prussia and Austria invaded Schleswig-Holstein. Meanwhile a Conference was convened in London to attempt to settle a new line of demarcation, but without success. On June 25 the Prussians took possession of the Isle of Alsen, the Danes were defeated, and the Danish Government was subsequently required to surrender Schleswig-Holstein and Lauenburg to the allies. By the Convention of Gastein, Schleswig was to be governed by Prussia, and Holstein by Austria. A dispute soon arose between Prussia and Austria, terminating in the war of 1866, in which Prussia took possession of both Duchies without difficulty. In this war the Prussians were signally victorious, and finally defeated the Austrians in the battle of Sadowa, who, by the terms of peace, were obliged to relinquish all connexion with the German Confederation. Prussia, moreover, by this war annexed Hanover, Hesse-Cassel, Nassau, and Hesse-Darmstadt, assumed military and diplomatic power to the north of the Main, and raised herself to the dignity of a Great Power.

In 1870, the Franco-German war commenced, nominally on account of the refusal of the King of Prussia to make certain promises, with regard to the candidature of the hereditary Prince of Hohenzollern for the throne of Spain, but it was, in fact, a culmination of a mutual hatred and rivalry which had for several years past been growing up between France and Prussia. War was declared by France, and a small victory was at first gained by her arms at Saarbrück on August 2, but here the tide turned. At Weissenbourg, on August 5, the French General Douay was killed and his troops routed; at Woerth, on August 6, after fighting most bravely under Marshal MacMahon, the French were put to flight, leaving an immense amount of ammunition and stores on the field. After this victory the German army, finding the passes of the Vosges completely undefended, marched without opposition on Paris. The victories of Saarbrück (August 6), Rezonville (August 16), Gravelotte (August 18), and Mouzon (August 30) followed, Nancy having submitted to the Crown

and to the more recent debates by Lyndhurst, Palmerston, Russell, and others in the British Parliament, on the rights and duties of neutrals, the law of allegiance and protection, the right of intervention, the maritime right of intervisitation in time of peace, etc. The diplomatic papers of Napoleon III., on Italian affairs, are most able productions.

Prince. On September 2, the battle of Sedan was fought, and Napoleon III., with 100,000 men, forced to surrender to the King of Prussia. The capitulation of Strasbourg, Toul, Orleans, Metz, Thionville, Phalsbourg, and Montmedy followed at short intervals. On November 10, the army of the Loire, under General d'Aurelle des Paladines, gained the sole French victory during the war, at Coulmiers. Rouen, Amiens, and Orleans were occupied by the German soldiers. In November some French troops, assisted by Pontifical Zouaves under General Charette, attempted to open the road to Paris, then invested by the enemy, but were defeated at Beaume-la-Rolande. In the following year the French were defeated at Le Mans, as also in various small engagements. Finally, on January 28, Paris capitulated to the German army. On February 26 the preliminaries of peace were signed at Versailles, by which (*inter alia*) Alsace, with the exception of Belfort, and Metz with part of Lorraine, were annexed to Germany, and France compelled to pay 200,000,000*l.* by instalments ranging over three years. The King of Prussia assumed the title of Emperor of Germany, shortly afterwards.

The details of the war between Turkey and Servia, 1876, and the events which have come to pass in the struggle between Russia and Turkey, are of too recent date to be mentioned, in detail, in this edition; some of the more important facts only will be mentioned in the following pages.



## CHAPTER II.

## NATURE AND SOURCES OF INTERNATIONAL LAW.

1. Definition of International Law—2. Division into natural law and positive law—3. What is meant by natural law—4. Its application to independent States—5. The positive law of nations—6. Relation between the natural and positive law of nations—7. The conventional law of nations—8. The customary law of nations—9. Customs, how far binding—10. Division of the positive law of nations by Wolfius and Vattel—11. Objections to those divisions—12. Distinction between absolute rights, rights of comity, and private rights—13. There is no universal law of nations—14. How far its rules are obligatory—15. Violations of its rules, how punished—16. Can sovereign States be punished?—17. General sources of international law—18. Justice as a source and test—19. Authorities on this point—20. History as a source—21. The Roman civil law—22. Decision of courts of prize—23. Adjudications of mixed tribunals—24. Ordinances and commercial laws of particular States—25. Decisions of local courts—26. Text-writers of approved authority—27. Reason of the authority of text-writers—28. Treaties and international compacts—29. Effect of treaties on the interpretation of terms—30. State papers and diplomatic correspondence.

§ 1. INTERNATIONAL law, or The law of nations, may be defined to be, *The rules of conduct regulating the intercourse of States.*

Most writers have endeavoured to frame their definition so as to embrace the sources of this law, rather than to describe the nature and character of the law itself. Thus, Grotius considers the law of nations as a positive institution, deriving its authority from the positive consent of all, or the greater part of civilised nations, united in a social compact for this purpose. While Rutherford denies the existence of any such social union among nations, and concludes that what is called the law of nations, when applied to States, is nothing more than what is called natural law when applied to individuals as parts of these collective bodies. Hobbes and Puffendorf also consider the general principles of natural law, and the law of nations, as one and the same thing, and the distinction between them as merely verbal, while others define

this law to consist only of the usages, customs, and conventions adopted and observed among nations. The definition here given avoids any reference to those questions which have been so much discussed by publicists, and upon which there is very little prospect of a general agreement.<sup>1</sup>

§ 2. The rules which ought to regulate the conduct of nations in their mutual intercourse are undoubtedly deduced, in part, from reason and justice, and from the nature of society existing between independent States or bodies politic; and, in part, from usage, and the agreements or compacts entered into between different nations. This difference in the nature and origin of these rules has led text-writers to divide international law into different branches. The most common of these general divisions is, into the natural law of nations, and the positive law of nations. The first of these branches has been subdivided into the Divine law, and the application of the law of God to States. The second branch has also been subdivided into the conventional law of nations and the customary law of nations. These divisions are somewhat arbitrary, and we shall follow them only so far as may be necessary or convenient, in pointing out the sources of international jurisprudence, and in discussing the nature and character of the rules which constitute that code.<sup>2</sup>

§ 3. By the Divine law, we understand the rules of conduct prescribed by God to his rational creatures, and revealed by the light of reason, or the sacred scriptures. 'Natural law,' says Grotius, 'is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitability or repugnance to the rational and social nature, and

<sup>1</sup> Vattel, *Droit des Gens*, prélim., § 3; Wheaton, *Elem. Int. Law*, pt. i. ch. i. § 11; Bentham, *Morals and Leg.*, vol. ii. p. 256; Foelix, *Droit Int.*, tit. pré., ch. i. § 1; Polson, *Law of Nations*, p. 1; Manning, *Law of Nations*, pp. 2, 57-58; Hautefeuille, *Des Nations Neutres*, tom. i. p. 3; D'Aguesseau, *Œuvres*, tom. i. p. 337; Savigny, *Röm. Rechts*, b. i. k. ii. § 11; Wildman, *Int. Law*, vol. i. p. 1; Bowyer, *Un. Pub. Law*, ch. ii.; Massé, *Droit Int.*, § 1; Bello, *Derecho Int.*, No. prel. § 1; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. § 1; Phillimore, *On Int. Law*, vol. i. § 9; Ompteda, *Literatur des Völkerrechts*, § 64; Rayneval, *Droit de la Nat.*, etc., liv. i. ch. i. § 10; Ortolan, *Dip. de la Mer*, liv. i. ch. iv.; Gardien, *De la Diplomatie*, tom. i. p. 36; Martens' *Précis du Droit des Gens*, § 2; Real, *Science du Gouvernement*, tom. i. p. 22.

<sup>2</sup> Heffter, *Droit International*, § 2; Pinheiro-Ferreira, *Notes sur Vattel*, tom. iii. p. 22; Wolfius, *Jus Gentium*, Proleg., § 3.



that, consequently, such actions are either forbidden or enjoined by God, the author of nature. Actions which are the subject of this exertion of reason are in themselves lawful or unlawful, and are, therefore, as such, necessarily commanded or prohibited by God.' In other words, there is a law of conscience, enjoining some actions and prohibiting others, according to their respective suitableness or repugnance to the law of reason and the sacred scriptures. Ethical writers distinguish between the principles of eternal justice, implanted by God in all his moral and social creatures, and the revealed will of God enforcing and extending these principles. But the examination and discussion of these distinctions belong to ethical science rather than international jurisprudence.<sup>1</sup>

§ 4. But as this Divine law, which God has prescribed to his rational creatures, whether revealed by the light of reason or the sacred scriptures, was evidently intended for the rules of conduct of individuals living together in a social state, it necessarily requires explanations and modifications when applied to the conduct of independent communities. Hence the law of nations has been distinguished from the natural or Divine law, the former including the rules for the application of natural law to independent States, which rules have been established by the great body of these communities for the promotion of their general utility, rather than that of a particular State. This view is opposed by Hobbes and Puffendorf, who consider the precepts to be the same, whether applied to individuals or states, and that the same law, 'which, when speaking of individual men, we call the law of nature, is called the law of nations when applied to whole States, nations, or people.' The distinction drawn by Grotius is, perhaps, not very obvious, and is of little or no practical importance.<sup>2</sup>

§ 5. Nor, indeed, is the definition of either Grotius or his opponents at all satisfactory; for international law, as understood in the present age, is something more and other than natural or Divine law, applied to the conduct of independent

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. i. § 10.

<sup>2</sup> Puffendorf, *De Jur. Nat. et Gent.*, lib. ii. cap. iii. § 23; Hobbes, *De Cive*, cap. xiv. § 4; Leibnitz, *De Usu Act. Pub.*, § 13; Cumberland, *De Legibus Naturalibus*, cap. v. § 1.

States, considered as moral beings; and in order to determine what is the rule to be observed among nations in any particular case, it is not sufficient to inquire what would be the natural law in a similar case, when applied to individual persons. 'The application of a rule,' says Vattel, 'cannot be reasonable and just, unless it is made in a manner suitable to the subject. We are not to imagine that the law of nations is precisely and in every case the same as the law of nature, with the difference only in the subjects to which it is applied, so as to allow of our substituting nations for individuals. A State or civil society is a subject very different from an individual of the human race; from which circumstance, pursuant to the law of nature itself, there result, in many cases, very different obligations and rights; since the same general rule, applied to two subjects, cannot produce exactly the same decisions when the subjects are different; and a particular rule which is perfectly just with respect to one subject, is not applicable to another subject of quite a different nature. There are many cases, then, in which the law of nature does not decide between State and State in the same manner as it would between man and man. We must, therefore, know how to accommodate the application of it to different subjects; and it is the art of applying it with a justness founded on right and reason that renders the law of nations a distinct science.'

Again, as individuals adopt positive human institutions for their government, so States are capable of contracting obligations toward others, either by their general acquiescence in certain positive rules for the regulation of their mutual intercourse, by that tacit convention implied from usage and practice, or by direct and positive compact or agreement. These, where not contrary to the law of nature, are binding rules of conduct, and must be inquired into before we can determine what is the rule to be observed by such States in any particular case. Hence arises that important branch called the *positive law of nations*, which has been subdivided into the *conventional law of nations* and the *customary laws of nations*.<sup>1</sup>

<sup>1</sup> Vattel, *Droit des Gens*, prélim., § 6; the 'Flad Oyen,' 1 *Rob.*, 140; Manning, *Law of Nations*, p. 67; Massé, *Droit Commercial*, liv. i. tit. ii. ch. i.; Martens, *Précis du Droit des Gens*, §§ 5 et seq.; Heffter, *Droit International*, §§ 1-4; Ortolan, *Diplomatie de la Mer*, liv. i. ch. iv.



§ 6. The relation between the two great branches of international law—the natural and the positive law of nations—is thus stated by a recent writer on this subject. ‘The necessity,’ says Phillimore, ‘of mutual intercourse is laid in the nature of States, as it is of individuals, by God who willed the State and created the individual. The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and it is expressed in the consent, tacit or declared, of independent nations. The law which governs the external affairs, equally with that which governs the internal affairs of States, receives accessions from custom and usage, binding the subjects of them as to things which, previous to the introduction of such custom and usage, might have been in their nature indifferent. Custom and usage, moreover, outwardly express the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them. But it is to be remembered that, in this latter case, usage is the effect and not the cause of the law.’<sup>1</sup>

§ 7. *The conventional law of nations* results from the stipulations of treaties, and consists of the rules of conduct agreed upon by the contracting parties. As such agreement binds only the contracting parties, it is evident that the conventional law of nations is not a universal, but a particular law. Nevertheless, as these agreements are not always limited to the intercourse of the contracting parties with each other, but extend to their intercourse with other nations, and are, moreover, frequently intended to express opinions or to establish rules of action, with respect to particular points or questions in the law of nations, they belong to history, and have an important influence in regulating the general intercourse of States, and in modifying and determining the principles of international law. Hence the stipulations of treaties between highly civilised nations form an important branch of the general law of nations.

<sup>1</sup> Phillimore, *On International Law*, vol. i., preface; Bynkershoek, *Quaest. Jur. Pub.*, lib. i. cap. x.; Bynkershoek, *De Foro Legatorum*, cap. iii. § 10, cap. vii. § 8; Rutherforth, *Institutes*, vol. i. ch. iii. §§ 1–6; Bowyer, *Universal Public Law*, ch. iv.; Cotellet, *Droit des Gens*, pt. i.; et seq.

§ 8. *The customary law of nations* embodies, says Mr. Justice Story, 'those usages which the continued habit of nations has sanctioned for their mutual interest and convenience.' As this law is founded on the tacit or implied consent of nations as deduced from their intercourse with each other, in order to determine whether any particular act is sanctioned or forbidden by this law, we must inquire whether it has been approved or disapproved by civilised nations generally, or at least by the particular nations which are affected in any way by the act.<sup>1</sup>

§ 9. Customs which are lawful and innocent are binding upon the States which have adopted them; but those which are unjust and illegal, and in violation of natural and Divine law, have no binding force. 'When a custom is generally established,' says Vattel, 'either between all the civilised nations of the world, or only between those of a certain continent, as of Europe for example, or between those which have most frequent intercourse with each other; if that custom is in its own nature indifferent, and much more if it be useful and reasonable, it becomes obligatory on all the nations in question, which are considered as having given their consent to it, and are bound to observe it toward each other, *as long as they have not expressly declared* their resolution of not observing it in future. But if that custom contains anything unlawful or unjust, it is not obligatory; on the contrary, every nation is bound to relinquish it, since nothing can oblige or authorise a violation of the law of nature.'

The foregoing remark of Vattel, that the customary law of nations may be varied or abandoned at pleasure, such variation or abandonment being previously notified, must be limited to the peculiar customs of particular States in their intercourse with other nations, and cannot be applied to general law, or what he calls the voluntary law of nations, which is founded on general usage or implied consent, as described in the next paragraph.<sup>2</sup>

§ 10. Wolfius, and his abridger, Vattel, distinguish between particular and general usages, and confine the term *customary* to the former, and introduce a third division of the positive

<sup>1</sup> Story, *Miscel. Writings*, p. 536; the 'Herstelder,' 1 *Rob.*, 115.

<sup>2</sup> Vattel, *Droit des Gens*, prélim., § 26; Fennings v. Lord Granville, 1 *Taunt. R.*, 246.



law of nations, which they call *the voluntary law of nations*, to designate that universal voluntary law of usage, or of custom, which has been established and sanctioned by the frequency of its recognition and the numbers who have approved it. From this subdivision they would exclude all usages which are confined to particular periods or to particular nations and countries.<sup>1</sup>

§ 11. This division of the positive law of nations, by Vattel, into voluntary, conventional, and customary laws, has been objected to by some as improper, and calculated to confuse rather than to elucidate the subject. It was adopted by Wheaton in the first edition of his elements of international law, but afterward rejected by him on the ground that the term 'voluntary law of nations' more properly designated the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and should be divided into two *species*—conventional law and customary law—the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations. Notwithstanding this objection, we think the divisions of Vattel not entirely without foundation, and, at least, as worthy of consideration. His terms, however, are not well chosen.<sup>2</sup>

§ 12. Other publicists have made still further and different divisions and subdivisions of this branch of international jurisprudence. Of these we shall mention but one, which not only seems to be well founded, but to point out distinctions which it is important to observe. The custom and usage of nations have established certain rights which are called *absolute*, or rights *stricti juris*, while, at the same time, increasing civilisation has, in other respects, mitigated the severity of these rights by the *usage of comity*—*comitas gentium*—by which is understood the rule of convenience, as distinguished from abstract right. Again, with regard to the intercourse of *individual* members of different States, this comity has produced what is termed *international law private*—*jus gentium privatum*—as distinguished from *international law public*, that is

<sup>1</sup> Vattel, *Droit des Gens.*, prélim., §§ 25-27; Wolfius, *Jus Gentium*, proleg., § 25; Chitty, *Com. Law*, pp. 28, 29.

<sup>2</sup> Pinheiro-Ferreira, *Notes sur Vattel*, tom. iii. p. 22; Wheaton, *Elem. Int. Law*, pt. i. ch. i. § 9, first edition, § 13.

to say, rules having reference, not to the relations of States among themselves, but the relations of individuals of one State to the laws and institutions of other States.<sup>1</sup>

§ 13. It is admitted by all, that there is no universal or immutable law of nations, binding upon the whole human race, which all mankind in all ages and countries have recognised and obeyed. Nevertheless, there are certain principles of action, a certain distinction between right and wrong,—between justice and injustice,—a certain divine or natural law,—or rule of right reason, which, in the words of Cicero, 'is congenial to the feelings of nature, diffused among all men, uniform, eternal, commanding us to our duty, and prohibiting every violation of it,—one eternal and immortal law, which can neither be repealed nor derogated from, addressing itself to all nations and all ages, deriving its authority from the common Sovereign of the universe, seeking no other law-giver and interpreter, carrying home its sanctions to every breast, by the inevitable punishment he inflicts on its transgressors.'

It is to these principles, or rule of right reason, or natural law, that all other laws, whether founded on custom or treaty, must be referred, and their binding force determined. If in accordance with the spirit of this natural law, or if innocent in themselves, they are binding upon all who have adopted them; but if they are in violation of this law, and are unjust in their nature and effects, they are without force. The principles of natural justice, applied to the conduct of States, considered as moral beings, must therefore constitute the foundation upon which the customs, usages, and conventions of civilised and Christian nations are erected into a grand and lofty temple. The character and durability of the structure must depend upon the skill of the architect, and the nature of the materials; but the foundation is as broad as the principles of justice, and as immutable as the law of God.

§ 14. It must not be inferred, that because there is no immutable law of nations absolutely binding upon all mankind, that the rules of international intercourse established by

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. §§ 140, 141; Foelix, *Droit Int. Privé*, tit. prélim. chs. i., iii.; the 'Maria,' 1 Rob. 367; Cushing, *Opin. of U. S. Att'ys. Genl.*, vol. vii. p. 18; Westlake, *Private Int. Law*, ch. i. § 1; Heffter, *Droit International*, § 2.



general consent and sanctioned by reason, are not obligatory upon States, and may be violated with impunity. These rules cannot, perhaps, with strict propriety be called *laws*, in the sense of commands proceeding from an authority competent in all cases to enforce obedience or punish violations. But, like the *laws of honour*, they are rules of conduct imposed by public opinion, and are enforced by appropriate sanctions. They are, therefore, by their analogy to positive commands, properly termed *laws*; and they are enforced, not only by moral sanctions, but by the fear of provoking general hostility, and incurring its evils, in case of violating maxims which are generally received and respected among nations.<sup>1</sup>

§ 15. Moreover, the law of nations provides, in a measure, for the enforcement of its rules, and the punishment of a violation of its maxims. Certain offences against this law, as piracy for example, wheresoever and by whomsoever committed, are within the cognisance of the judicial power of every State; for, being regarded as the common enemies of all mankind, any one may lawfully capture pirates upon the high seas, and the tribunals of any State, within whose territorial jurisdiction they may be brought, can try and punish them for their crimes. And in case of smaller offences, where the accused must be sent to the tribunals of his own country for trial, or where other States can exercise no jurisdiction whatever, the moral obligation of a State to punish its subjects for offences against international law is so strong that no one can habitually neglect to do so with impunity. A State which should openly violate, or permit its subjects to violate, the well-established and generally received maxims of this law, would not only lose its standing among nations, but would provoke universal reprobation and hostility.

§ 16. Publicists have discussed the question whether States are liable to *punishment* for offences against international law. While all admit that these bodies politic are capable of rights and liable to obligations, some contend that they can never be subjects of *criminal law*, and, therefore, that no punishment can be inflicted on them for offences committed. It is probably true that States cannot be *punished*, in the strict techni-

<sup>1</sup> Wildman, *International Law*, vol. i. p. 32; Bentham, *Morals and Legislation*, vol. ii. p. 256; Austin, *Province of Jurisprudence*, pp. 147, 207; Sedgwick, *On Stat. and Con. Law*, pp. 222-223.

cal sense of that term. Nevertheless, if one State be injured or insulted by another, it may seek redress by war, and require not only indemnity for the past, but security for the future; and in order to attain this object, it may destroy the property of the offending State and take away its territory. These acts are not, in the strict sense of that term, acts of punishment, but directly or indirectly, acts of self-defence; and the State which resorts to such measures against another, can justify its conduct only on the ground of their being necessary, for the preservation of its own rights, the welfare of other States, or the peace of the world. They are not defensible as punishments due and inflicted upon the offender, for one State has no authority to punish the offences of another. Nevertheless, they are, with respect to the offending State, to all intents and purposes, *punishments*.<sup>1</sup>

§ 17. In the present imperfect state of international law, which recognises the obligatory force of no written code, and acknowledges no permanent judicial expositor of its principles, we must necessarily resort to the precedents collected from history, the opinions of jurisconsults, and the decisions of tribunals, in order to ascertain what these principles are, and to determine what are the proper rules for their application. Some of these principles and rules have been settled for ages, and have the force of positive laws which no one will now venture to dispute or call into question; while others are admitted only by particular States, and cannot be regarded as binding upon any one which has not adopted them. The sources of international law are therefore as various as the subjects to which its rules are applied; and, in deducing these rules, we should distinguish between those which are applicable only to particular States, and those which are obligatory upon all. We will now proceed to point out some of these sources, and to discuss their character and authority.

§ 18. The first source from which are deduced the rules of conduct which ought to be observed between nations, is the *Divine law*, or principle of justice, which has been defined 'a constant and perpetual disposition to render every man his due.' The peculiar nature of the society existing among independent States, renders it more difficult to apply this prin-

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. § 11; Pinheiro-Ferreira, *Com. sur Vattel*, verb. 'punir'; Savigny, *System des Röm. Rechts*, b. ii. pp. 94-96.



ciple to them than to individual members of the same State ; and there is, therefore, less uniformity of opinion with respect to the rules of international law properly deducible from it, than with respect to the rules of moral law governing the intercourse of individual men. It is, perhaps, more properly speaking, the test by which the rules of positive international law are to be judged, rather than the source from which these rules themselves are deduced.<sup>1</sup>

§ 19. Grotius lays down the broad principle that the positive law of nations may *add* to, but cannot *subtract* from, the law of nature. 'Nimirum humana jura multa constituere possunt *præter* naturam, *contra* nihil.' Voet, Suarez, and Wolfius express themselves to the same effect. Burke says : 'All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of *original justice*.' Mackintosh says : 'The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of *States*, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxim of moral philosophy, and the most complicated controversies of civil or public law, there subsists a connection. *The principle of justice*, deeply rooted in the nature and interest of man, pervades the whole system, and is discoverable in every part of it, even to its minutest ramification in a legal formality, or in the construction of an article in a treaty.' Vattel considers '*justice* as the basis of all society ;' and that, although natural law cannot decide between nation and nation, as it would between individual and individual, yet the rules of international law must be according to *justice*, founded on *right reason*.<sup>2</sup>

§ 20. The *history* of transactions relating to the intercourse of States, both in peace and war, is one of the most faithful sources of international law. What is called the voluntary, or positive law of nations, is mainly derived from usage and custom, and to determine these we must have recourse to the history of what has passed from time to time among the several nations of the world ; not that history will afford us

<sup>1</sup> Justinian, *Institutes*, lib. i. tit. i.

<sup>2</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. vi. § 6 ; Voet, *Comm. ad Pand.*, lib. i. § 19 ; Suarez, *De Legibus, etc.*, lib. ii. cap. xx. § 3 ; Wolfius, *Juris Gentium*, § 163 ; Vattel, *Droit des Gens*, liv. ii. chap. v. § 63 ; Mackintosh, *Miscellaneous Works*, p. 183.

the record of any constant and uninterrupted practice, but because we shall there find what has been generally approved and what has been generally condemned in the variable and contradictory practice of nations; 'for,' in the words of Grotius, 'such a universal approbation must arise from some universal principle, and this universal principle can be nothing else but the common sense or reason of mankind.'<sup>1</sup>

§ 21. It will generally be found that the deficiencies of precedent, usage, and express international authority, may be supplied from the rich treasury of the *Roman Civil Law*. Indeed, the greater number of controversies between States would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to States. 'Although,' says Wiseman, 'the civil law was not intended by the Roman legislators to reach or direct beyond the bounds of the Roman empire . . . yet, since there is a strong stream of natural reason continually flowing in the channel of the Roman laws, and that there is no affair or business known to any part of the world now which the Roman empire dealt not in before, and their justice still provided for, what should hinder but the nature of affairs being the same, the same general rules of justice and dictates of reason may be as fitly accommodated to foreigners dealing with one another (as it is clear that they have been by the civilians of all ages), as to those of one and the same nation, when one common reason is a guide and a light to them both; for it is not the persons, but the case, and the reasons therein, that is considerable altogether?''<sup>2</sup>

§ 22. According to the present law and practice of nations, the seat of judicial authority of *prize-courts* is located in the belligerent country, and they are dependent, in a measure, upon the laws and institutions of the particular States by which they are established. In this respect they are *ex parte* tribunals. But the subjects of their adjudication are, without distinction, matters relating to the citizens and property of their own States, of neutrals, and of the belligerent country; and the law itself, by which their decisions should be governed, has no locality, and it is the duty of such a court to

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. i. § 12.

<sup>2</sup> Wiseman, *Excellency of the Civil Law*, p. 110; Burke, *Works*, vol. ii., *Letters on a Regicide Peace*; the *Maria* 1 Rob. 363.



determine questions which come before it exactly as it would determine them by sitting in the neutral or belligerent country, the rights of whose citizens are to be adjudicated upon. In theory, therefore, such courts are regarded as international tribunals. But the practice has not at all times corresponded with this theory, and, on this account, it is necessary to rigidly investigate the principles upon which these adjudications are founded, and the reasonings by which they are supported. With this caution in their use, the books of Admiralty reports may become an instructive source of information respecting the practical rules of international law. It is also necessary to continually bear in mind the distinction between cases decided upon local law and institutions, and those decided upon general principles, which should govern the intercourse of independent States. Moreover, in maritime States, a court will feel, though perhaps unconsciously, the influence of a national bias in favour of the captor.<sup>1</sup>

§ 23. Greater weight is justly attributable to the judgments of *mixed tribunals*, appointed by the joint consent of the several States between which they are to decide, than to those of Admiralty courts established by, and dependent, in some measure, on the instructions of a single State; provided that the judges and umpires of these mixed tribunals possess the same character, ability, and learning, as the judges of Admiralty. But, unfortunately, this has not generally been the case; and the decisions of these boards of arbitration have too often been mere compromises of differences, rather than the elucidation of principles of international law, founded upon the true basis of international justice and supported by right reason. Nevertheless, these adjudications furnish a fruitful source of international law, and may always be consulted with profit and instruction.<sup>2</sup>

§ 24. *The ordinances and commercial laws* of particular States, and the rules prescribed for the conduct of their commissioned cruisers and prize tribunals, may also be referred to for illustrations of the voluntary law of nations, as understood and practised by such States. They, however, should

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 68; the 'Maria,' 1 Rob. 350; the 'Recovery,' 6 Dod. R., 349; and see vol. ii. p. 412.

<sup>2</sup> *Report of Decisions of Com. between U. S. and Great Britain*, 1856; The decision of the arbitrators assembled at the Conference of Geneva, 1872, to determine on the 'Alabama' case, is an example of the above.



be investigated with caution, and are received only as particular admissions of general principles. Nevertheless, some of the most important modifications and improvements in the modern law of nations have thus originated in the ordinances and commercial regulations, the proclamations and manifestoes of particular States. 'These public documents furnish, at all events,' says Phillimore, 'decisive evidence against any State which afterward departs from the principles which it has thus deliberately invoked; and, in every case, thus clearly recognize the fact that a system of law exists, which ought to regulate and control the international relations of every State.'<sup>1</sup>

§ 25. The same remarks are applicable to the *decisions of local courts*. The adjudications of questions arising from international relations by such tribunals are not obligatory upon other States, except so far as they conform to general principles and established usages; but as many questions can be decided only in this way, we may derive from this source many rules relative to the positive or practical law of nations. Such decisions, however, from their very nature, are of very limited authority, as expositions of the rules of international law; but the reasons given by the judges, and the precedents referred to in their opinions, furnish a vast fund of information on the particular points discussed. And where such opinions result from a liberal and enlarged inquiry, the decisions are well calculated to strengthen and embellish the conclusions of reason.<sup>2</sup>

§ 26. Another source, and perhaps the most fruitful of all, is formed of *the works of text-writers* of approved authority, showing the usage of nations, or the general opinion, respecting their mutual conduct, with the definitions and modifications introduced by general consent. As a general rule, authors of text-books and treatises on international law have risen above the local interests and prejudices which too often influence the writings of diplomatists, and even the decisions of courts, and have treated the subject in a philosophical spirit worthy of all commendation, and which causes their opinions to be referred to as authority on all disputed ques-

<sup>1</sup> Polson, *Law of Nations*, § 3; Phillimore, *On Int. Law*, vol. i. § 57; the 'Santa Cruz,' 1 Rob. 61.

<sup>2</sup> Duer, *On Insurance*, vol. i. p. 479; *Griswold v. Waddington*, 15 Johns. R., 57; 16 Johns. R., 438.

tions. Of course we cannot expect to find a complete uniformity of opinions in these writers, but there is a very general concurrence of views on all the great and leading principles which they have discussed. 'In case where the principal jurists agree,' says Kent, 'the presumption will be very great in favour of the validity of their maxims; and no civilised nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.' Sir James Mackintosh, in his speech on the annexation of Genoa to the kingdom of Sardinia, says: 'It is not my disposition to overrate the authority of this class of writers, or to consider authority in any case as a substitute for reason. But these eminent writers were, at least, necessarily impartial. Their weight, as bearing testimony to general sentiment and civilised usage, receives a new accession from every statesman who appeals to their writings, and from every year in which no contrary practice is established, or hostile principles avowed . . . I have never heard their principles questioned, but by those whose flagitious policy they had by anticipation condemned.'<sup>1</sup>

§ 27. But it is not entirely upon their unanimity of opinion on great principles that the authority of text-writers has so great weight in the settlement of controversies between States. As a general rule, reference is made to those who wrote before the cause of the controversy arose, and who are therefore impartial. Moreover, it may be that the text-writers belonging to the very country which is urging a demand, have, in advance, pronounced against it. 'If the authority of Zouch,' says Phillimore, 'of Lee, of Mansfield, and, above all, of Stowell, be against the demand of England; if Valin, Domat, Pothier, and Vattel be opposed to the pretensions of France; if Grotius and Bynkershoek confute the claim of Holland; Puffendorf that of Sweden; if Heineccius, Leibnitz, and Wolff array themselves against Germany; if Story, Wheaton, and Kent condemn the act of America, it cannot be supposed (except, indeed, in the particular epoch of a revolution, when all regard to law is trampled under foot)

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 19; Mackintosh, *Miscel. Works*, p. 704; Suarez, *De Legibus*, lib. vi.; the 'Maria,' 1 Rob. 360; Wheaton, *Elem. Int. Law*, pt. i. ch. i. § 12; Bello, *Derecho Internacional*, No. Prel. 87.



that the *argumentum ad patriam* would not prevail; at all events, it cannot be doubted that it *ought* to prevail, and should the country relying upon such authority be compelled to resort to arms, that the guilt of the war would rest upon the antagonist refusing to be bound by it.<sup>1</sup>

§ 28. Express *compacts* between States, and *treaties* of peace, alliance, and commerce, declaring, modifying, or defining the rules which regulate their mutual intercourse, furnish another fruitful source of international law. Such treaties and conventions are of binding force only upon the contracting parties, and they cannot modify the original and pre-existing law of nations to the disadvantage of those States which are not direct parties to these compacts; but where they relax the rigour of the primitive law in favour of others, or furnish a more definite rule of practice in matters which have given rise to conflicting pretensions, the conventional laws thus introduced are not only obligatory upon the contracting parties, but constitute a rule to be observed by them toward the rest of the world. And although one or two treaties, varying from the general usage and custom of nations, cannot alter the pre-existing international law, yet an almost perpetual succession of treaties, establishing a perpetual rule, will go very far toward proving what that law is upon a disputed point.<sup>2</sup>

§ 29. Thus the consent of several nations, evidenced by treaties, to adopt a particular interpretation of a particular term, is, in the absence of other testimony, strong evidence that such is the true international meaning belonging to it. It is true that no treaty between two or more States can affect the general principles of international law, or directly prejudice the interests of others, though it may do so indirectly by positively declaring the interpretation to be given to a doubtful term, and thus laying down a principle binding, on them at least, in their intercourse with the rest of the world. This doctrine is laid down with great precision by Lord Grenville in his speech in the House of Peers, on the convention with Russia in 1801. We adopt Sir R. Phillimore's synopsis of the

<sup>1</sup> Phillimore, *On Int. Law*, vol. i., § 60; Triquet et al. v. Bath, 3 Burr. R., pp. 14-80.

<sup>2</sup> Wheaton, *Elem. Int. Law*, part i. ch. i. § 12; Heffter, *Droit International*, § 8; Massé, *Droit Commercial*, liv. i. tit. ii. ch. ii.; Ortolan, *Diplomatie de la Mer*, liv. i. ch. v.



part relating to *contraband of war*. 'He argued that, by the language of that convention, a new sense, and one hitherto repudiated by Great Britain, with respect to *contraband of war*, would be introduced, so far at least as Great Britain was concerned, into *general* international law; inasmuch as some provisions of the treaty, with respect to what should be considered *contraband of war*, were merely *prospective*, and confined to the *contracting parties*, England and Russia, while other provisions of the same treaty were so couched in the preamble, the body, and certain sections which contained them, as to set forth, not the concession of a *special* privilege to be enjoyed by the contracting parties only, but a *recognition* of one universal pre-existing right: they must be taken as laying down a *general rule* for all future discussion with *any power whatever*, and as establishing a principle of law which was to decide *universally* on the just interpretation of the technical term *contraband of war*.'<sup>1</sup>

§ 30. State papers, and *diplomatic correspondence* between statesmen distinguished for their character and learning, frequently contain much valuable information respecting the particular points and questions of international law which are discussed by them. And perhaps these discussions exhibit the views and opinions of particular States more correctly than the compacts or treaties which may result from them, as such conventions are always more or less the result of compromise or temporary necessity. Moreover, these documents sometimes contain important admissions of what is, or ought to be, the law on points not immediately involved in the conflicting pretensions which have given rise to such discussions. The diplomatic correspondence growing out of particular negotiations may, therefore, very often be referred to with profit, in the investigation of questions connected with the rules of international law established by the consent and usage of nations.<sup>2</sup>

<sup>1</sup> Wheaton, *Elem. Int. Law*, part iv. ch. iii. § 29; Phillimore, *On Int. Law*, vol. i. § 42; Hansard, *Parliamentary Debates*,—1801.

<sup>2</sup> Wheaton, *Hist. Law of Nations*, p. 749.

## CHAPTER III.

## SOVEREIGNTY OF STATES.

1. A Sovereign State defined—2. A State distinguished from a nation or people—3. A colony or dependency is a part of a State—4. But not itself a State—5. Mere fact of dependence does not destroy sovereignty—6. Nor occasional obedience and habitual influence—7. Nor feudal vassalage and paying tribute—8. They may impair or destroy sovereignty—9. Effect of a protectorate—10. Effect of a union of several States—11. A personal union of states—12. A real Union—13. An incorporate Union—14. A Federal Union—15. When a mere confederation—16. When a composite State—17. Semi-sovereign States—18. Sovereignty, how acquired—19. Identity not affected by internal changes—20. A State involved in Civil War—21. Independence of a revolted colony or province—22. Recognition of such Independence—23. State Sovereignty, how lost—24. Changes of Government—25. Change by internal revolution—26. By dismemberment of a part—27. By division of one into two or more separate States—28. By the incorporation of several States into one.

§ 1. A STATE is a body politic, or society of men united together for mutual advantage and safety. Such a society has affairs and interests peculiar to itself, and is capable of deliberation and resolution; it is therefore regarded as a kind of moral person, possessing a will and an understanding, and susceptible of rights and obligations. From the nature and design of such a society, it is necessary that there should be established in it a *public authority*, to order and direct what is to be done by each individual in relation to the end and object of the association. This political authority, whether vested in a single individual or in a number of individuals, is properly the *sovereignty* of the State. This term, however, in international law, is usually employed to express the external rather than the internal character of a nation, with respect to its ability or capacity to govern itself, independently of foreign powers. A *sovereign State* may, therefore, be defined to be *any nation or people organised into a body politic and exercising the rights of self-government*.<sup>1</sup>

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. i. § 14; Vattel, *Droit des*



§ 2. A *State* is distinguishable from a *nation* or a *people*, since the former may be composed of different races of men, all subject to the same supreme authority. Thus, the Austrian, Russian, British and Ottoman empires are composed of a variety of nations and people. So, also, the same nation or people may be subject to, or compose, several distinct and separate States. Thus the Poles are subject to the dominion of Austria, Prussia, and Russia, respectively; and the Italians constitute several distinct and independent sovereignties.<sup>1</sup> The terms nation and people, however, are frequently used by writers on international law as synonymous with the term States.<sup>2</sup>

§ 3. The sovereignty of a State has reference to its political character, rather than to the nature of its territorial possessions. The territory of some States is in one compact body, like Prussia, Bavaria, and Belgium, in Europe, Mexico, and the United States, in America, while the territory of other States, like that of Great Britain, consists of detached parts situate in every quarter of the habitable globe. Under the general appellation of *State* are included all the possessions of a nation, wheresoever situated, so that a *colony*, however distant, is, in the eye of international law, as much a part of the State which establishes it as is a city or province belonging to its most ancient territory.<sup>3</sup>

§ 4. As a colony, a possession, or a dependency, constitutes only a part of the State, it cannot in itself be regarded, in international law, as a distinct political organisation. Hence, any public or private corporation, created by, and deriving its authority from a State, cannot of itself constitute a separate and independent sovereignty. Thus, the East India Company, although exercising the sovereign powers of peace and war, with respect to the native princes and

*Gens*, liv. i. ch. i. § 4; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 12; Burlamaqui, *Droit de la Nat. et des Gens*, tome iv. pt. i. ch. iv.; Martens, *Précis du Droit des Gens*, §§ 16-19; Gardén, *De la Diplomatie*, liv. i. § 3; Bello, *Derecho Internacional*, pt. i. ch. i. § 1; Heffter, *Droit International*, §§ 16-25; Merlin, *Répertoire*, verb. 'souveraineté.'

<sup>1</sup> But this is so no longer, since the unification of Italy in 1860.

<sup>2</sup> Phillimore, *On Int. Law*, vol. i. § 65; Rayneval, *Int. du Droit Nat.*, liv. i. ch. iv.

<sup>3</sup> Vattel, *Droit des Gens*, liv. i. ch. xviii. § 210; Wildman, *Int. Law*, vol. i. p. 40; Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. iii. § 7; Heineccius, *Elementa Juris Nat. et Gent.*, lib. i. § 231; Puffendorf, *Jus. Nat. et Gent.*, lib. viii. cap. xii. § 5; Bowyer, *Universal Public Law*, ch. xxvii.



people, acted in subordination to the supreme power of the British empire, and was represented by the British Government in all its relations with foreign sovereigns and States.

§ 5. The mere fact of dependence, however, does not prevent a State from being regarded in international law as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Much more importance is attached to the nature and character of its connection with other States, and the degree and extent of its dependence. Thus, many European States, which are still regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, or by the stipulations of unequal treaties of alliance and protection.<sup>1</sup>

§ 6. Nor is the sovereignty of a particular State necessarily destroyed by its mere nominal obedience to the commands of others, nor even by an habitual influence exercised by others over its councils. Thus, the city of Cracow, in Poland, with its territory, was declared by the Congress of Vienna, in 1815, to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia. Although its councils were habitually influenced by these great powers, it was nevertheless regarded in international law as a sovereign State; and when, by the convention of 1846, it was annexed to the empire of Austria, the Governments of Great Britain, France, and Sweden protested against the proceeding as a violation of the Act of 1815, by which it was recognised as an independent State.<sup>2</sup>

§ 7. So, also, tributary States, and those subject to a kind of feudal dependence or vassalage, are still considered as sovereign, unless their sovereignty is destroyed by their relation to other States. Tribute, like that paid by the European maritime powers to the Barbary States, does not necessarily affect the sovereignty of the tributary; nor does the acknow-

<sup>1</sup> Vattel, *Droit des Gens*, lib. i. ch. i. §§ 5, 6; Phillimore, *On Int. Law*, vol. i. § 77; Riquelme, *Derecho Pub. Int.* tome i. p. 104.

<sup>2</sup> Martens, *Nouveau Recueil*, tome ii. p. 386; Klüber, *Acten des Wiener Cong.* b. v. § 138; Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii.; De Cussy, *Précis Historique*, p. 7; Martens, *Précis du Droit des Gens*, §§ 19 et seq.

ledgment of a nominal vassalage or feudal dependence, like that of Naples to the Papal See, prior to 1818, necessarily impair the sovereignty of the vassal State. Its position in the eye of international law is not *necessarily* affected by its connections of this kind with others. The law regards the *fact* of sovereignty rather than the mere name by which it is designated.<sup>1</sup>

§ 8. But the character of a State *may* be legally affected by its connection with others, and its sovereignty will be considered as impaired or entirely destroyed, according to the nature of the compact, the extent of the influence exercised by the superior, and the obedience acknowledged or rendered by the inferior; no matter whether such condition results from political organisation or from treaties of unequal alliance and protection. If a State, in either of these modes, parts with its rights of negotiation and treaty, and loses its essential attributes of independence, it can no longer be regarded as a sovereign State, or as a member of the great family of nations. Its legal *status* is not changed by a loss of relative power, but by a loss of the essential attributes of independence and sovereignty—the *right to exercise its volition, and the capacity to contract obligations*.<sup>2</sup>

§ 9. The effect of a *protectorate* upon the sovereignty of a State must depend entirely upon the character and conditions of the protection afforded. No doubt, one State may place itself under the protection of another without losing its international existence as a sovereign State, if it retains its capacity to treat, to contract alliances, to make peace and war, and to exercise the essential rights of sovereignty. But these rights must be retained *de facto*, as well as *de jure*, for although a State may retain the forms of independence, if it be practically and notoriously governed by officers appointed by another State, and incapable of exercising its own volition, it will be regarded as a mere dependence of the governing power.<sup>3</sup>

<sup>1</sup> Ward, *Hist. Law of Nations*, vol. ii. p. 69; Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. xvii.; Heffter, *Droit International*, §§ 30-31.

<sup>2</sup> Fletcher *v.* Peck, 6 *Cranch. Rep.* p. 146; The Cherokee Nation *v.* The State of Georgia, 5 *Peters. Rep.* p. 1; The U. S. *v.* Rogers, 4 *Howard Rep.* p. 572; Martens, *Précis du Droit des Gens*, § 820.

<sup>3</sup> Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii.; Martens, *Nouveau Recueil*, tome ii. p. 663; Wheaton, *Hist. Law of Nations*, pp. 5, 56-60; Vattel, *Droit des Gens*, liv. i. ch. xvi. § 192.



§ 10. Two or more sovereign States may be united together under a common ruler, or by a federal compact; and it will depend upon the nature of this union or confederation, whether such States retain their separate sovereignty, notwithstanding this connection with others. If each separate State retains the essential qualities of independence,—the right of will and judgment, and the full capacity to contract obligations,—it will still be regarded as a distinct society or body politic, possessing the rights of sovereignty, and subject to its duties; but if it has lost these qualities by such union with others, either by becoming subject to their will, or by creating a new national power, of which it is only a component part, it can no longer be regarded, in the eye of international law, as a sovereign State, although it may retain many of its sovereign rights with respect to its confederates.<sup>1</sup>

§ 11. A union of two or more States under a common sovereign is called a *personal union*, if there is no incorporation, and if the component parts are united with a perfect equality of rights. Thus, Hanover, and the United Kingdom of Great Britain and Ireland, were at one time subject to the same prince, but there was no dependence on each other and both retained their respective national rights of sovereignty. Sometimes the individuality of the State is merged by such personal union, (*unio personalis*), and, with respect to its external relations, remains for a time in abeyance, but emerges again on the dissolution of the union and resumes its rank and position as an independent sovereign State.<sup>2</sup>

§ 12. A *real union* of different States, under a common sovereign, is where the several component parts are not only united under the same sceptre, but the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers, although still retaining respectively their distinct fundamental laws and other political institutions. Thus the Austrian monarchy, prior to 1849, was a *real union*, composed of the here-

<sup>1</sup> Martens, *Précis du Droit des Gens*, §§ 20-29; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. §§ 15, 16; Klüber, *Droit des Gens*, pt. i. cap. i. § 27; Heffter, *Droit International*, §§ 19-29; Merlin, *Répertoire*, verb. 'souveraineté.'

<sup>2</sup> Phillimore, *On Int. Law*, vol. i. § 76; Bowyer, *Universal Public Law*, ch. xxvii.



ditary dominions, the kingdoms of Hungary, Bohemia, and other States, each of which retained a separate sovereignty with respect to its co-ordinate States, but were component parts of the empire, with respect to their international relations with other powers. By the constitution of 1849 and the patent of 1851, a more central system was adopted, and provision was made for uniform municipal legislation.<sup>1</sup>

§ 13. An *incorporate* union is where several States are united under a common sovereign, and a common government and legislature, although each may have its distinct laws and a separate but subordinate administration. Thus the three kingdoms of England, Scotland, and Ireland are incorporated into an empire, the sovereignty of each original kingdom being completely merged by their successive unions in the United Kingdom, which, in international relations, is regarded as a single State. There is no essential difference, in international law, between a *real* and an *incorporate* union of States, the sovereignty of the component parts being in both cases considered as completely merged in the new imperial sovereignty which results from such union.<sup>2</sup>

§ 14. Sovereign States are sometimes firmly united together by a federal compact, without acknowledging any common sovereign. This kind of union is perhaps less frequent among monarchies than among States which have a republican form of government. From the extremely complicated nature of these leagues or federal compacts, it is sometimes very difficult to determine how far the sovereignty of each nation is affected or impaired by the conditions or regulations of such union. These compacts are divided by publicists into two general classes, *confederated States* and *composite States*.

§ 15. By a *confederation*, or *system of confederated States*, we understand that kind of union, or compact, which does not essentially differ from an ordinary treaty of equal alliance. The resolutions of the federal body are enforced not as laws directly binding upon the individual subjects of each State, but upon each separate government which adopts them, and gives them the force of law within its own jurisdiction; thus

<sup>1</sup> *Annual Register*, 1849, p. 317; *Annuaire des Deux Mondes*, 1852-3, pp. 541-545.

<sup>2</sup> Merlin, *Répertoire*, verb 'souveraineté.'

leaving to each State the exercise of its own will and responsibility in its general intercourse with foreign powers.

The Swiss Confederation of 1815, established under the mediation of the allied powers, and guaranteed by the Congress of Vienna, has been regarded by some text-writers as a mere league or system of confederated States, not differing essentially from a treaty of perpetual alliance between independent communities, in which each member of the union retains its own sovereignty unimpaired. But as the Diet formed by the twenty-two cantons of Switzerland had power to regulate the tariff of frontier duties, to provide for the common protection, to support a common army, with the exclusive power of declaring war and concluding treaties of peace, alliance, and commerce with foreign States, it seems to us that, by this confederation, the essential qualities of State sovereignty were merged in the Diet, and that the sovereign power of each separate canton was greatly impaired, if not completely destroyed, so far as international relations with foreign powers were concerned.

The Germanic confederation, formed between the free cities of Germany, the Emperor of Austria, the King of Prussia, and other German States, and having for its declared object the preservation of the internal and external security of Germany, and the independence and inviolability of the confederated States, left to each member the power of contracting alliances and making treaties with other foreign States, except with an enemy against whom the confederation had declared war, and provided that such treaties or compacts were not directed against the security of the confederation or the individual States of which it was composed. It may be doubted if subsequent changes in this Germanic constitution have not materially impaired the sovereignty of the smaller States.

The confederation of 1778, between the United States of North America, was nothing more than a *system of confederated States*. The difficulty of enforcing the laws and regulating foreign affairs of the government led to the adoption of a Constitutional Union.<sup>1</sup>

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. i. ch. ii. §§ 21-25; Wheaton, *Hist. Law of Nations*, pp. 447 et seq.; Story, *On the Constitution*, b. ii. ch. iii.; Kent, *Com. on Am. Law*, vol. i. pp. 212 et seq.; Hamilton, *The Federa-*



§ 16. A *composite State*, or *supreme federal government* results from a grant of supreme federal powers to the government of the union, with the consequent limitations imposed upon the separate governments of the several compact States. Each separate State may retain its own legislature, and its distinct laws and administration, and its separate sovereignty may still subsist internally in respect to its co-ordinate States, and, in respect to the supreme federal government, in questions of power not expressly granted to it; but in all external relations its sovereignty is completely merged and destroyed.

The union of the United States of America, by the federal constitution of 1787, is regarded, in international law, as a composite State, or supreme federal government. So, also, of the Republic of Mexico, both as a confederation of States, and as a more central organisation under the departmental system.<sup>1</sup>

§ 17. *Semi-sovereign States* are those which do not possess all the essential rights of sovereignty, and which, therefore, can be regarded as subjects of international law only indirectly, or at least in a subordinate degree. Such States must generally, in war, share the fortunes of their protector, and in peace, must have his consent to the engagements they may desire to form with others. But as they are, for certain purposes, and under certain limitations, to be dealt with independently of such protectors, it is necessary to regard them as distinct organisations. Such States are usually independent in their action, on mere questions of comity, such as the rights of strangers in their own territory, and of their own subjects in foreign countries.<sup>2</sup>

§ 18. The sovereignty of a State is acquired either at the origin of the civil society of which it consists, or when it separates itself from the community of which it formed a part, and assumes the rights and obligations of a distinct and independent political organisation. All questions, with respect to the origin of States belong to the province of political philosophy, rather than to that of international law. As

*list*, No. xv.; Heffter, *Droit International*, § 21; Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii.

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. §§ 118 et seq.

<sup>2</sup> Phillimore, *On Int. Law*, vol. i. § 78; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 13; Moser, *Beiträge, etc.*, B. i. p. 508.



has already been remarked, the sovereignty of a State, as considered in international law, is not determined by the character of its origin, the extent of its power or domain, or by the nature of its internal government, but by its relations to others and its capacity to deliberate and act for itself.<sup>1</sup>

§ 19. A State, as to the individual members of which it is composed, is a fluctuating body, being kept up by a constant succession of new members; so, also, its form of government and municipal constitution may be subjected to frequent alterations and changes; but these fluctuations and changes in the constituent parts of the body politic, and in their relations to each other, do not affect the character of the body itself, in its external relations to other communities,—that is, in international law. The State itself remains the same political body, until its identity is destroyed by interruption in its existence as a separate and distinct society; and it neither loses any of its rights, nor is discharged from any of its obligations, by any mere municipal change or internal revolution.<sup>2</sup>

§ 20. Vattel has laid down the rule, that when a country is divided by a civil war, each faction is to be deemed an independent State, and that a foreign power may assist those whose cause it deems to be just.<sup>3</sup> This doctrine of Vattel is probably founded upon a misconstruction of a passage of Grotius; it is not reconcilable with reason or precedents, but is opposed to what Vattel himself has said with respect to the interference of one State in the internal affairs of another. If a foreign State may take part in the civil wars of its neigh-

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. § 264; Klüber, *Droit des Gens*, pt. iii. ch. i. § 23; Heffter, *Droit International*, §§ 23, 24.

<sup>2</sup> Rutherforth, *Institutes*, b. ii. ch. x. §§ 12, 13, 14; Bello, *Derecho Internacional*, pt. i. cap. i. § 8; Merlin, *Répertoire*, verb. 'souveraineté.'

<sup>3</sup> As an example of this, he quotes the interference of the Prince of Orange, and the assistance granted by him to the English against James II. To this may be added the assistance of Great Britain on behalf of the Netherlands and against Spain; and also the assistance given by France in the war of Revolution to the United States, not merely by recognition, but by a secret treaty offensive and defensive, and this while at peace with Great Britain. See *Parl. Deb.*, 1819, vol. xl. 1256; *Canning's Speeches*, vol. v. p. 322.

But in 1866 the United States refused to recognise the *de facto* government of the Emperor Maximilian of Mexico, or the blockade of Matamoras, which his government had declared, notwithstanding that the Government had been formally recognised by England, France, and Spain. *Ann. Reg.*, 1866; *Ibid.* 1867.

hours, there would be no limit to its right to interfere in their domestic affairs. His principle, that the parties to a civil war are independent of all foreign authority, and that no foreign power has any right to judge of their acts toward each other, is correct. Both parties may be entitled to the rights of war toward each other, and consequently to the rights of belligerents with respect to foreign States as neutrals in the contest, such as the rights of blockades, of sieges, &c. But beyond those rights, which are necessarily incidental to a state of war, a foreign power cannot, during the war, regard the two factions as independent States, and give assistance to the one whose cause it may deem to be just! Such conduct would be a direct violation of the rights of sovereignty and independence. But even supposing that the two parties, from the very commencement of a civil war or a revolution, are to be treated in every respect as independent States, it by no means follows that a foreign power may render assistance to the one whose cause it may deem to be just. This would be constituting such foreign power a judge of the *justice* of the war; whereas, if both parties are to be considered as independent States, the war is to be deemed, in international law, as *just* on both sides! Moreover, would the justice or injustice of the war be in itself a sufficient reason for the interference of a foreign power? Certainly not.

The above-mentioned rule of Vattel has been copied by Wheaton without comment, and apparently without questioning its correctness. But, notwithstanding this implied endorsement of so high an authority, we have no hesitation in pronouncing the doctrine as not only erroneous, but exceedingly dangerous, from the fact that it justifies the most objectionable species of intervention in the internal affairs of States. But the language of Wheaton is more limited and cautious than that of Vattel; and when he says that other States 'may espouse the cause of the party which they believe to have justice on its side,' and that by so doing a State becomes 'the enemy of the party against whom it declares itself, and the ally of the other,' he probably means merely to express the legal results of such a declaration, and not to say that the justice or injustice of the cause would in itself justify such declaration, or authorise such interference. In

this view, his language is reconcilable with other parts of his work.<sup>1</sup>

§ 21. Whilst the civil war continues, or while a revolted colony or province is shaking off the bonds of its former government, a foreign State should either remain a passive spectator, or, if its own relations require diplomatic intercourse with the revolted society, it should treat such revolted society as a *de facto* government only, in its foreign relations, and not as an independent State, with respect to its relations with its own sovereign, or its own metropolitan government. But when the contest is virtually determined, and the revolted province or colony has virtually established its independence, foreign powers, without any just offence to the metropolitan country, may recognise that independence and enter into full diplomatic and commercial relations with the new State as a separate and distinct sovereignty. It is not necessary in such cases to await the acknowledgement of that independence by the former sovereign; of the fact of such independence, each State may judge for itself. 'The absence of all jurisdiction,' says Wildman, 'to determine the right, leads to the necessary consequence, that, when in the result of a civil war, a state changes its government, or a province, or colony, that before had no separate existence, is in the possession of the rights of sovereignty; the possession of sovereignty *de facto* is taken to be possession *de jure*; and any foreign power is at liberty to recognise such sovereignty by treating with the possessor of it as an independent State.'<sup>2</sup> Where sovereignty is necessary to the validity of an

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. vi. § 56; Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. xviii. § 2; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 7; Kent, *Com. on Am. Law*, vol. i. pp. 24, 25.

<sup>2</sup> President Lincoln immediately after his accession to power, in 1861, found himself face to face with a most formidable insurrection. In April, 1861, he ordered a levy of 75,000 men to meet the danger. Finding this number insufficient, armies of 300,000, 400,000, and even 700,000 men were raised, exhausted, and replenished in this mighty contest. A blockade of the coasts of nine States was proclaimed, and a navy was suddenly created, supposed to be adequate to the task of blockading 3,000 miles of coast.

In 1862 Lord Shelburne declared in the House of Lords that it had 'always been the practice of the English Government to recognise a *de facto* Government which has succeeded in establishing itself on the consent of a whole people,' and that the Southern Confederacy had not then been so successful as to justify the British Government in recognising them as a Power which had proved its ability to maintain its own inde-



act, no distinction is or ought to be made between sovereignties founded on a good or bad title. Few governments have been founded on free suffrage and election ; most have origi-

pendence. But in course of time Great Britain could not any more than the other Powers of Europe fail to recognise in the vast extent of the territories involved in hostilities, and in the fierce nature of the contest, a civil war of the most extraordinary character. It was admitted by the United States that whenever an insurrection against the established Government of a country takes place, the duty of Governments under obligations to maintain peace and friendship with it appears to be at first to abstain carefully from any step that may have the smallest influence in affecting the result. Whenever facts occur of which it is necessary to take notice, either because they involve a necessity of protecting personal interests at home or avoiding an implication in the struggle, then it appears to be just and right to provide for the emergency by specific measures precisely to the extent that be required, but no further. It is then facts alone, and not appearances or presumptions that justify action. But even these are not to be dealt with further than the occasion demands ; a rigid neutrality in whatever may be done is of course understood. If, after the lapse of a considerable period, there be little prospect of the termination of a struggle, especially if this be carried on upon the ocean, a recognition of the parties as belligerents appears to be justifiable.

Eventually, in proclaiming that both parties in the vast civil war were to be treated as belligerents, and in admitting the validity of a blockade of 3,000 miles of coast, Great Britain acknowledged an existing fact, and recognised the international law applicable to that fact. She, moreover, directed prosecutions against those persons who were engaged in enlisting seamen or recruits in the service of either belligerent. But she refused the invitation of the Federal Government of the United States, in 1865, to allow it the belligerent rights of blockade and of search and detention to the widest extent, and to refuse them altogether to the other party in the civil war, who had possession of an extensive territory, who had all the forms of a regular Government, framed on the model of the United States, and who were wielding large regular armies, for such, in the opinion of the British Government, have been as contrary to the practice of civilised nations as it would have been to the rules of justice and of international law. Further, Great Britain decided not to refuse an asylum to persons landing on her shores and conforming to her laws, merely because they might be in hostility with a Government or nation with whom Great Britain was at peace. On the cessation of the Civil War, Great Britain further insisted, notwithstanding the opposition of the United States Government, that any Confederate vessel of war called upon to depart from any British port, should have the twenty-four hours' rule conceded to it, and that vessels which were lying in British waters, or which during the space of a month after should come into such waters, should be permitted to disarm and assume a peaceful character. But they were entitled to no other protection, except to so much as might be administered by law in time of peace, and the twenty-four hours' rule did not apply to their case. The United States Government were entitled to maintain that they were forfeited, and to demand their delivery in a British Court. See *Parl. Papers*, 1863-65.

The following opinion of Judge Daly addressed to the Hon. Ira Harris, written at New York, December 21, 1861, is in favour of according to the private ships of war of a *de facto*, although in the eyes of the United

nated in violence and faction. In international transactions possession is sufficient. Otherwise it would be necessary to inquire into the origin of sovereignties, and to ascertain

States not a *de jure*, State, the privileges of privateers instead of treating them as pirates. He says :—

‘In compliance with your request at our conversation in Washington, I will put in writing the reasons why the southern privateersmen should be regarded as prisoners of war, and not as pirates.

‘Privateering is a lawful mode of warfare, except among those nations who by treaty stipulate that they will not as between themselves resort to it. Pirates are the general enemies of all mankind, *hostes humani generis*; but privateersmen act under and are subject to the authority of the nation or power by whom they are commissioned. They enter into certain securities that they will respect the rights of neutrals; their vessel is liable to seizure and condemnation if they act illegally, and they wage war only against the power with which the authority that commissioned them is at war. A privateer does no more than is done by a man of war, namely, seize the vessel of the enemy, the prize or booty being distributed as a reward among the captors. The only difference between them is that the vessel of war is the property of the Government, manned and maintained by it, while the other is a private enterprise undertaken for the same general purpose, and giving guarantees that it will be conducted according to the established usages of war. In short, one is a public, the other a private vessel of war, neither of which acquires any right to a prize taken until the lawfulness of the capture is declared, by a competent court, under whose direction the thing taken can be condemned and sold, and the proceeds distributed in such proportions as the court considers equitable. The Government of the United States declined to become a party to the International Treaty of Paris of 1856, and therefore the whole people of the United States, as well those who are maintaining the Government as those who are in rebellion against it, have never agreed to dispense with privateering. It is not our interest to do so. We are a maritime people with a large extent of sea coast, which, while it leaves us greatly exposed to attacks by sea, at the same time affords facilities that render privateering to us one of our most effective arms in warfare. This was the case in our contest with England in 1812; and, should a war now grow out of the affair of the “Trent,” privateering would be indispensable to enable us to cope with so formidable a power as that of Great Britain.

‘A great deal has been written against this mode of warfare, but nations, like individuals, act upon the instinct of self-preservation, and avail themselves of the natural defences which grow out of their situation; and a system, therefore, which enables us to keep a small navy in peace and improvise a large one in war will never be relinquished because nations who have everything to lose, or little to gain by its continuance, desire that it should be abolished. Being, then, a legitimate mode of making war, what is the difference between the Southern soldier who takes up arms against the Government of the United States upon land and the Southern privateersman who does the same upon the water? Practically there is none; and if one should be held and exchanged as a prisoner of war, the other is equally entitled to the privilege. The court before which the crew of the “Jefferson Davis” were convicted as pirates held that they could not be regarded as privateers, upon the ground that they were not acting under the authority of an independent State, with the reco 1 rights of sovereignty. This objection applies equally to



whether they are founded upon a good or upon a bad title. Such an inquiry could answer no good purpose, and would furnish ample occasion to disturb the peace of nations.<sup>1</sup>

<sup>1</sup> Wildman, *International Law*, vol. i. p. 57 ; Wicquefort, *P Ambassadeur*, etc. lib. i. pp. 40, 57, 58.

the man-of-war's men in the Southern fleets, and to every soldier in the Southern army, none of whom are acting under the authority of a recognised Government. The Constitution defines treason to be the levying of war against the United States and the giving of aid and comfort to its enemies. All of them are engaged in doing this ; and although the Southern privateersmen may fall specifically under the provisions of the Act defining piracy, the guilt of the one is precisely the same as that of the other. The question then arises—as there is in point of fact no difference between them—is every seaman or soldier that shall be taken in arms against the Government to be hung as a traitor or a pirate ? If the matter is to be left to the courts, conviction and sentence of death must follow in every instance. In the case of the “Jefferson Davis,” the court said that during civil war, in which hostilities are prosecuted on an extended scale, persons in arms against the established Government captured by its naval or military forces are often treated not as traitors or pirates, but according to the humane usages of war. They are detained as prisoners until exchanged or discharged on parole, or, if surrendered to the civil authorities and convicted, they are respited or pardoned ; but the court said this was a matter with which courts and juries had nothing to do ; that it was purely a question of Government policy depending upon the decision of the Executive or Legislative Department of the Government, and not upon its judicial organ.

“If this view be correct, the disposition of this matter rests exclusively with the Government, and its decision must be pronounced sooner or later, as every day increases the complication and difficulties growing out of the present state of things. Are the Courts to go on ? Is the Government prepared to say that every man in arms against the United States upon the land or upon the water is to be tried and executed as a traitor or pirate, either upon the ground that it is right, or upon the supposition that it will prove an effective means for suppressing the rebellion ? That policy was tried by the Duke of Alva in the revolt of the seven provinces of the Netherlands, and 18,000 persons by his order suffered death upon the scaffold, the result being a more desperate resistance, the sympathy of surrounding nations, and the ultimate independence of the Dutch. Neither the constitution of the United States nor the act against piracy was framed in view of any such state of things as that which now exists. The civil war which now prevails is in its magnitude beyond anything previously known in history. The revolting States hold possession of a large portion of the territory of the Union, embracing a great extent of the sea coast and including some of our principal cities and harbours. They hold forcible possession of it by means of an army estimated at 300,000 men, and are practically exercising over it all the power and authority of government. They claim to have separated from the United States, to have founded a Government of their own, and are in armed resistance to maintain it. To reduce them to obedience, and to recover that of which they hold forcible possession, it has been necessary for us to resort to military means of more than corresponding magnitude, until the combatants on both sides have reached the prodigious number of 1,000,000 of men.



§ 22. The recognition<sup>1</sup> of the independence and sovereignty of a revolted province by other foreign States, when that independence is established in fact, is therefore a question of

<sup>1</sup> Referring to the term 'recognition,' Mr. Canning stated in 1823 that 'the law of nations was entirely silent on this point,' but he attached this meaning to it:—"If the colonies say to the mother country, 'We assert our independence,' and the mother country answers, 'I admit it,' that is recognition in one sense. If the colonies say to another State, 'We are independent,' and that other State replies, 'I allow that you are so,' that is recognition in another sense of the term. That other State simply acknowledges the fact, or rather, its opinion of the fact. But without a treaty of alliance and co-operation, that latter recognition could have no such effect as tranquillising the State, and establishing and confirming its independence. Recognition, according to Mackintosh, is used in two senses—1st, as a technical term of international law, in which it denotes the explicit acknowledgement of the independence of a country by a State which formerly exercised sovereignty over it, such as the acknowledgement of the independence of Portugal and Holland by Spain and of the American colonies by Great Britain. 2nd. A neutral country by measures of practical policy may imply an acknowledgement of the independence of another. This is a virtual recognition, the most conspicuous part of which is the act of sending and receiving diplomatic agents. It implies no guarantee, no alliance, no aid, no approbation of the successful revolt, no intimation of an opinion concerning the justice or injustice of the means by which it has been accomplished. These are matters beyond the jurisdiction of the neutral. It would be an usurpation for it to sit in judgment on them. As a State it can neither condemn nor justify revolutions which do not affect its safety and are not amenable to its laws; a tacit recognition of a new State not being a judgment for the new Government nor against the old, is not a deviation from perfect neutrality or a cause of just offence to the dispossessed ruler. These doctrines are not even controverted by the jurists of the Holy Alliance. See *Works of Mackintosh*, vol. iii.

'The principal nations of Europe, recognising this state of things, have conceded to the rebellious States the rights of belligerents—a course of which we have no reason to complain, as we did precisely the same thing towards the States of South America in their revolt against the Government of Spain. It is natural that we should have hesitated to consider the Southern States in the light of belligerents before the rebellion had expanded to its present proportions; but now we cannot, if we would, shut our eyes to the fact that war, and war upon a more extensive scale than usually takes place between contending nations, actually exists. It is now, and it will be continued to be, carried on upon both sides by a resort to all the means and appliances known to modern warfare, and unless we are to fall back into the barbarism of the middle ages, we must observe in its conduct those humane usages in the treatment and exchange of prisoners which modern civilisation has shown to be equally the dictates of humanity and policy. For every seaman that we have arrested as a pirate, they have incarcerated a Northern soldier, to be dealt with exactly as we do with the privateersmen. We have convicted as pirates four of the crew of the "Jefferson Davis," and there are others in New York awaiting trial. Are those men to be executed? If they are, then by that Act we deliberately consign to death a number of our own officers and soldiers, the most of

policy and prudence only, which each State must determine for itself; but this determination must be made by the sovereign legislative or executive power of the State, and not

whom owe their captivity and present peril to the heroic courage with which they stood by their colours in a day of disastrous flight and panic

‘If such a course is to be pursued, it will not be very encouraging for the soldier now in arms for the maintenance of the Union, to know that what may be asked of him is to fight upon one side with the risk of being hanged upon the other, and in the face of the enemy with his line broken down, instead of rallying again, he may, in view of the possibility of a halter, deem it prudent to retire before the double danger. If, on the other hand, we convict these men as criminals and pause there, then the crime, of which we have declared them to be guilty, is not followed by its necessary consequence, the proper punishment. There is no terror inspired and no check interposed by such a procedure, for the plainest man in the South knows that the motive which restrains us from going further is the fact that execution of these men as pirates seals the doom of a corresponding number of our own people; that the account is equally balanced; that with ample means of retaliation they have the power to prevent, or if mutual blood is to be shed in this way, we and not they will have commenced it. By such a course nothing is effected, except to keep our own officers and soldiers in the cells of Southern prisons, subject to that mental torture produced by the uncertainty of their fate, which with the majority of men is more difficult to bear than the certainty of death itself, and obliges them to endure, in the ill-provided and badly-conducted prisons in which they are confined, sufferings, the sickening details of which are constantly before us in their published letters to their friends. “I little thought,” writes the gallant Colonel Cogswell, of the regular service, “when I faced the storm of bullets at Edward’s Ferry, and escaped a soldier’s death upon the field, that it was only to be left by my country to die upon a gallows.” And the nature of their sufferings will be understood when it is told that the noble-hearted and self-sacrificing Colonel Corcoran, was handcuffed and placed in a solitary cell, with a chain attached to the floor, until the mental excitement produced by the ignominious treatment, combining with a susceptible constitution and the infectious character of the locality, brought on an attack of typhoid fever. Shall this state of things continue to exist? Let us take counsel of our common sense. These men are treated as criminals, because, while we give to the Southern soldiers the rights of war (for numerous exchanges of soldiers have taken place), we convict the Southern mariner of a crime punishable with death. Is there any reason, even upon the grounds of policy, for making this distinction? We have by the blockade of the whole Southern coast cut the privateersman off from bringing his prize into the ports of the South for adjudication, and the ports of all neutral nations being closed against him for such a purpose, he is deprived of means of making lawful prize, and must eventually convert his vessel into a ship of war, or degenerate into a pirate by unlawful acts which will make him amenable to the tribunal of every civilised nation. The comparative injury that may be done to our commerce by the few privateers which it will be now in the power of the rebellious States to maintain upon the ocean is as nothing compared to the disastrous and lasting consequences to the whole nation—to its industry, its commerce, and its future—that would grow out of making this war one of retaliatory vengeance. We have the fruitful experience of history to admonish us, that in such acts are sown the seeds of the dissolution of nations, and especially of republics. By



by any subordinate authority, or by the private judgment of individual subjects. And until the independence of the new State is recognised by the government of the country of which it was before a part, or by the foreign State where its sovereignty is drawn in question, courts of justice, and private individuals, are bound to consider the ancient state of things as remaining unaltered.<sup>1</sup>

acceding to the rebellious States the rights of belligerents, at least to the extent of exchanging prisoners, whether privateersmen, men-of-war's men, or soldiers, we do not concede to them the rights of Sovereignty. There is a well-defined distinction between the two, recognised by the United States Court in the case of *Rose v. Himley* (4 *Cranch*, 241). One may exist without the other, and by exchanging prisoners, therefore, we concede nothing and admit nothing, except what everybody knows, that actual war exists, and that, as a Christian people, we mean to carry it on according to the usages of civilised nations.

'The existing embarrassment is easily overcome; further prosecutions can be stopped, and in respect of privateersmen who have been convicted, the President, acting upon the suggestion of the Court that tried them, can, by the exercise of the pardoning power, relieve them from their position as criminals, and place them in that of prisoners of war.

'In conclusion, we are apt to forget that we are carrying on this war for the restoration of the Union, and that every act of aggression not essential to military success will but separate more widely the two sections from each other, and increase the difficulty of cementing us again in one nationality. We are to remember that the people of the South, whose infirmity it has been to have very extravagant ideas of their own superiority, and whose contempt of the people of the North has been in proportion to their want of information respecting them, have been hurried into their present position by the professional politicians and large landed proprietors. . . . War, when conducted in accordance with the strictest usages of humanity, is a sufficiently bloody business, and if we are to add to its horrors by hanging up all who fall into our hands as traitors or pirates, we leave to the South no alternative but resistance to the last extremity.'

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 10 et seq.; Martens, *Nouvelles causes*, etc. tome i. pp. 370-494; Garden, *De Diplomatie*, liv. ii. § 6; Webster, *Works*, vol. vi. pp. 488-506; Kennet v. Chambers, xiv. *How. R.* p. 38; Hoyt v. Gelston, 3 *Wheat. R.* p. 324, note; the 'Manilla,' 1 *Ed. Ad. R.*, pt. i.; Bello, *Derecho Internacional*, pt. i. cap. i. § 7; the 'Santisima Trinidad,' 7 *Wheat. R.* p. 305; The 'Pelican,' 1 *Ed. Ad. R. Appen. D.* The City of Berne, in Switzerland, v. the Bank of England, 9 *Ves.*, 347; Dolder v. the Bank of England, 10 *Ves.*, 352; *Ibid.* 283; Thompson v. Powels, 2 *Sim.*, 194; Taylor v. Barclay, *Ibid.* 213; the United States of America v. Wagner, 2 *Law R.* (Ch. App.), 582.

As a matter of municipal law, no person can contract with or assist a revolted colony, or a part of another State, without leave of his own Government, before the same have recognised the separate independence of the colony or part of a State. See *Jones v. Garcia del Rio*, 1 *Turn. and Russ.* 297; *Yrisson v. Clement*, 2 *Car. and P.*, 223; the United States v. Palmer, 3 *Wheat.* 610; *Cherriot v. Foussat*, 3 *Binn.* 252. And it is submitted that those sections of the Foreign Enlistment Act, 1870 (33 and 34 Vict. c. 90), which prohibit illegal enlistment or building ships, &c., for any foreign State at war with any foreign State at peace with



§ 23. The sovereignty of a State may be lost in various ways. It may be vanquished by a foreign power and become incorporated into the conquering State as a province, or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a State will entirely cease. Again, two sovereign States may become incorporated into one, so as to form a new sovereign State in place of the other two whose independent existence, as States, is entirely destroyed by such incorporation.

Thus, the incorporation of the Seven United Provinces and the Austrian Low Countries, by the treaties of Vienna, under the Prince of Orange, as King of the Netherlands, was the union of two distinct sovereignties, forming a new single sovereign State. By the incorporation of Wales, Scotland, and Ireland, into Great Britain, and of Normandy and Brittany into France, these incorporated States lost their existence as distinct and substantive political bodies.<sup>1</sup>

§ 24. Questions of great importance sometimes arise with respect to the international effects produced by internal changes in the form of government, and by a change in the sovereignty of a State, with respect to its duties and obligations toward others. These questions relate to treaties, public debts, the public domain, private rights of property, and to responsibility for wrongs done to the governments or subjects of other States. We will consider these matters—1st, with respect to the effects of a change in the internal form of the Government; 2nd, with respect to the effects of a dismemberment of a State by the revolt or loss of a province; 3rd, the effects of a division of one into two or more separate and independent States; and, 4th, the effects of an incorporation

Great Britain, are by sect. 30 of the same Act extended to the case of a rebellion of such dimensions as to constitute a new Government or nationality; that last-mentioned section defines 'foreign State' to include 'any foreign prince, colony, province, or part of any province or people, or any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province or people.' Therefore it would seem to be equally unlawful for a foreign State to hire or build a ship in British waters to employ against insurgents, or for insurgents to fit out the same under similar circumstances, against a Government in amity with Great Britain. Compare 59 Geo. III., c. 69, and case of the 'Salvador,' *P. C. R.*

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. § 125; Puffendorf, *De Jure Nat. et Gent.* lib. viii. cap. xii. § 9; Bello, *Derecho Internacional*, pt. i. cap. i. § 8. So also the gradual unification of Italy since 1859.

of two or more separate States into one, forming a new and distinct sovereignty.<sup>1</sup>

§ 25. As a general rule, a mere change in the form of Government, or in the person of the ruler, does not affect the duties and obligations of a State toward foreign nations. All treaties of amity, commerce, and *real* alliance, remain in force precisely as if no intervening change had taken place, except in cases where the compact relates to the form of Government itself, or to the person of the ruler in the nature of a guaranty. Public debts, whether due to or from the revolutionised State, are neither cancelled nor affected by any change in the constitution or internal Government of a State. So, also, of its public domain and right of property. If a revolution be successful, and a new constitution be established, the public domain and public property pass to the new Government. The State, on the other hand, remains responsible for the wrongs done to the Government or subjects of another State, notwithstanding any intermediate change in the form of its Government or in the persons of its rulers. These results flow necessarily from the principle that the identity of a State is preserved, notwithstanding the accidental changes in its internal constitution.<sup>2</sup>

§ 26. The dismemberment of a State, by the loss of a portion of its subjects and territory, does not affect its identity, whether such loss be caused by foreign conquest, or by the revolt and separation of a province. Such a change no more affects its rights and duties, than a change in its internal organisation, or in the person of its rulers. This doctrine applies to debts due to, as well as from, the State, and to its rights of property and its treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.<sup>3</sup>

§ 27. The case is slightly different where one State is

<sup>1</sup> Wildman, *Int. Law*, vol. i. p. 68; Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. ix. §§ 8, 9, 10; Heffter, *Droit International*, § 25.

<sup>2</sup> Vattel, *Droit des Gens*, liv. ii. ch. xii. §§ 183-197; Mably, *Du Droit Public*, tome i. pp. 111, 112; D'Aguesseau, *Œuvres de M. le C.*, tome i. p. 493, § 4; Montesquieu, *l'Esprit des Loix*, liv. xxvi. ch. xx.; Grotius, *De Jur. Bel. ac Pac.* lib. ii. cap. ix. § 8; Tindall, *Essay on the Laws of Nations*, p. 12; Kent, *Com. on Am. Law*, vol. i. pp. 25, 26; Bynkershoek, *Quæst. Jur. Pub.* lib. ii. cap. x.; Heineccius, *Elementa Juris Nat. et Gent.* lib. ii. § 231.

<sup>3</sup> Wheaton, *Hist. Law of Nations*, p. 546; Terrett et al. v. Taylor, 9



divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division, are (unless they have been the subject of a special agreement), rateably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established. Kent says: 'If a State should be divided with respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all

*Cranch's Rep.* p. 50; *Calvin's Case*, 7 *Coke Rep.* p. 27; *Wildman, Int. Law*, vol. i. p. 68.

In 1859, an insurrection broke out in that part of the Pope's dominions known as the Romagna or the Legations. Sardinian troops entered the territory, and encouraged the inhabitants in their resistance. The Sardinian Government nominated an Extraordinary Commissioner in Romagna, alleging that it was to prevent the national movement from leading to disorder. The late Cardinal Antonelli addressed a circular to the foreign courts, declaring this act to be not only a violation of neutrality, but in reality an active co-operation with the rebels on the part of the Sardinian Government. The late Emperor Napoleon, writing to the Pope, December 31, 1859, declared that 'the Powers cannot disown the incontestable rights of the Holy See to the Legations.' On the other hand, the assembly of Romagna formally cast off their allegiance to the Pope, asserting that, having in former centuries lived under their own statutes and laws, and in the beginning of the present century formed part of a civil kingdom, they were in 1815 placed under the temporal government of the Pope against their will; that they considered that government incompatible with Italian nationality, with civil equality and political liberty; that it had *de facto* abdicated its sovereignty by giving up its noblest prerogatives into the hands of Austrian generals, who for many years had held the civil and military governments of these provinces; and that the temporal government of the Pope is substantially and historically distinct from the spiritual government of the Church, which they would always respect.

In 1870, Signor Lanza and his colleagues persuaded Victor Emmanuel to occupy Rome, and on September 20 of that year a considerable Italian army appeared before the gates of Rome, under the pretext of affording protection to Pius IX. against revolutionary attacks. The Pope only made a formal resistance. After the ceremony of a plébiscite, or popular vote, Rome was declared part of the kingdom of Italy.

It is interesting to note that in June, 1866, a resolution was moved by the Congress of the United States that, as the Irish people and their friends in the States were moved by a patriotic purpose to assert the independence of Ireland, and as the active sympathies of the people of the United States were naturally with all men who struggled to achieve such ends, and as the British Government, against whom they were struggling, was entitled to no greater consideration from the United States as a nation than that demanded by the strict letter of international law, for the reason that, during the civil war



the parts in common.' Story says: 'It has been asserted, as a principle of common law, that the division of an empire creates no forfeiture of previously vested rights of property; and this principle is equally consonant with the common sense of mankind, and the maxims of eternal justice.'<sup>1</sup>

§ 28. The converse of this rule is also generally true; that is, where several separate States are incorporated into a new sovereignty, the rights and obligations which had accrued to each one separately, before the incorporation, belong to, and are binding upon, the new State which is created by such incorporation. But the rule must be varied or modified to suit the nature of the union formed, and the character of the act itself of incorporation in each particular case. Thus, a distinction must be made between the mere union, or confederation of States, and the creation of a new sovereignty, or composite State. In the one case, the obligations would remain with the States originally separate, while in the other case, they would, as a general rule, be transferred from the constituent parts to the new body politic. But if, by the act of incorporation, and by the constitution of the composite State, the rights and obligations of the component parts were to remain with the States originally separate, it could hardly be contended that the new sovereignty had either acquired the one or incurred the other. What might be claimed or incurred, under a general rule of presumptive law, could

of the United States, she, in effect, by her conduct repealed her neutrality laws, and as, when reparation was demanded for damages to the United States commerce, resulting from her wilful neglect to enforce the same, she arrogantly denied all responsibility, therefore they should repeal an Act approved April 20, 1818, entitled, 'An Act in addition to an Act for the punishment of certain crimes against the United States,' it being the neutrality law under which the President's proclamation against the Fenians was issued. This resolution was lost; and a substitute was moved that the President of the United States, in the opinion of Congress, should reconsider the policy which has been adopted by him as between the British Government and the Fenians, who were struggling for their independence; and that he should be requested to adopt as nearly as practicable the same course of procedure which was pursued by the Government of Great Britain during the civil war in the United States, recognising both parties as lawful belligerents, and observing between them strict neutrality. This resolution was also negatived.

<sup>1</sup> Kent, *Com. on Amer. Law*, vol. i. p. 26; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 9, pt. iv. ch. i. § 12; Phillimore, *On Int. Law*, vol. i. § 137; Zacharia, *Staats- und Bundesrecht*, § 58; Terrett et al. v. Taylor et al. 9; *Cranch's Rep.* p. 50; Kelly v. Harrison, 2 *Johnson's Cases*, p. 29; Jackson v. Dunn, 3 *Johnson's Cases*, p. 109; Calvin's Case, 7 *Coke Rep.* p. 27

hardly be enforced against written instruments which provide especially against such claims or obligations. Nevertheless, if one of these constituent parts, originally a separate State, should, by the act of incorporation, vest in the new sovereignty all its means of satisfying its debts and obligations, the new State would, even in the case of a mere federal union, be bound to assume such debts and obligations to the extent of the means so transferred.<sup>1</sup>

<sup>1</sup> Florida Bonds, *Com. of Claims between U. S. and G. B.* pp. 246 et seq. ; Holford's Case, *Com. of Claims between U. S. and G. B.* pp. 382 et seq. ; Flassan, *Hist. de la Diplom.*, tome iii. p. 129 ; Merlin, *Répertoire*, verb. 'souveraineté'.

## CHAPTER IV.

## RIGHTS OF INDEPENDENCE AND SELF-PRESERVATION.

§ 1. Independence of a Sovereign state—2. Foreign interference in its internal government—3. Its right to choose its own rulers—4. Such interference in dependent and confederated States—5. Interference in virtue of treaty stipulations—6. Proffered mediation, and mediation by invitation—7. Distinction between pacific mediation and armed intervention—8. When an arbitrator may employ force—9. Interference to preserve a balance of power—10. Treaty of Paris and Congress of Vienna in 1814 and 1815—11. Attempted tripartite treaty respecting Cuba—12. Interference for self-security—13. This is a pretext rather than an excuse—14. Independence of a State in its legislation—15. In its judiciary—16. In rewarding and punishing its own subjects—17. The case of Martin Koszta—18. Right of self-preservation—19. Means incidental to general right—20. Use of these means may be limited by treaty—21. By the rights of others—22. Extraordinary increase of army and navy—23. Fortifications and military schools—24. Right of self-defence without the limits of a State—25. Mr. Phillimore's basis of this pretended right—26. Defect of his argument—27. Such acts are belligerent, even when justifiable.

§ 1. EVERY sovereign State may, from the very nature of its organisation, freely exercise its sovereign rights in any manner not inconsistent with the equal rights of other States. The very fact of its sovereignty implies its independence of the control of any other State. It may therefore exercise all rights and contract all obligations incident to its sovereignty, as a separate, distinct, and independent society, or political organisation. These rights and obligations are limited only by the law of nature and the existence of similar rights in others. The international rights of sovereign States have therefore been divided into two classes: *absolute* and *conditional*, the former including those rights to which a State is entitled as a distinct being or sovereignty, and the latter including those rights to which it is entitled only under particular circumstances in its relation to others.<sup>1</sup>

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 1; Klüber, *Droit des Gens*, § 36; Vattel, *Droit des Gens*, prelim. § 15; Rayneval, *Inst. du Droit Nat.* liv. ii. ch. i.; Bello, *Derecho Internacional*, pt. i. cap. i. § 7; Heffter, *Droit International*, §§ 29-31; Riquelme, *Derecho Internacional*, lib. i. tit. i. sec. i. cap. v.; Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii. and iii.



§ 2. The right of every sovereign State to establish, alter, or abolish, its own municipal constitution and form of government, would seem to follow, as a necessary conclusion, from these premises. And from the same course of reasoning, it will be inferred, that no foreign State can interfere with the exercise of this right, no matter what political or civil institutions such sovereign State may see fit to adopt for the government of its own subjects and citizens.<sup>1</sup> It may freely change from a monarchy to a republic, from a republic to a limited monarchy, or to a despotism, or to a government of any imaginable shape, so long as such change is not of a character to immediately, or of necessity, affect the independence, freedom and security of others.<sup>2</sup>

§ 3. The right of a sovereign State to the choice of its own rulers rests upon the same foundation as its right to determine the form of its own internal constitution; and the interference of a foreign State in the one case cannot be justified except under the same circumstances and upon the same grounds as in the other, viz., *the immediate and pressing danger to its own independence and security*. In other words, the change must involve *external* as well as *internal* relations, in order to render foreign interference in such case justifiable, even under the most liberal and extended rules of construction. Moreover, even in the case supposed, if the danger is only remote and problematical, it would fail to make the interference justifiable in the eye of international law.<sup>3</sup>

§ 4. No writer of authority, on international law, advo-

<sup>1</sup> Vattel says that the Spaniards broke this law when they judged the Inca of Peru, concerning the administration of his government, by their own laws. Other examples of the breach of this law are the invasion of Holland in 1787 by Prussia; that of France by the same nation in 1792; that of Poland, and the annihilation of its separate independence by the joint action of Russia, Prussia, and Austria.

In 1794 Mr. Grey drew the attention of the House of Commons to the fact that foreign troops were suffered to be landed in England without the consent of Parliament, and that the same was contrary to the Bill of Rights, but the case was defended by the Government on the ground that the prohibition merely extended to time of peace, not to time of war.—Massey, *Hist. of Eng.*, vol. ii. p. 52.

<sup>2</sup> Wildman, *Int. Law*, vol. i. pp. 47, 68; Phillimore, *On Int. Law*, vol. i. § 148; Martens, *Précis du Droit des Gens*, § 78; Grotius, *De Jur. Bel. ac Pac.* lib. ii. ch. ix. § 8; Bynkershoek, *Quæst. Jur. Pub.* lib. ii. ch. xxi. § 1.

<sup>3</sup> Kent, *Com. on Am. Law*, vol. i. p. 21; Phillimore, *On Int. Law*, vol. i. §§ 389, 390; Vattel, *Droit des Gens*, prelim. § 22, liv. i. ch. v. §§ 66, 67.

cates any general right of one sovereign and independent State to interfere with the domestic concerns and internal Government of another sovereign and independent State. Some, however, make numerous exceptions to the general rule, and attempt to justify interference by one State, in the internal affairs of another, in particular cases and for certain specified objects. The principal grounds upon which such interference has been justified are : first, self-defence ; second, the obligations of treaty stipulations ; third, humanity ; and fourth, the invitation of the contending parties in a civil war. We will here examine each of these grounds, with respect to pacific interference, reserving for another place a discussion of how far they will justify a resort to force or a war of intervention.<sup>1</sup>

§ 5. Foreign interference, in the *internal* affairs of a State, has sometimes been defended on the ground of a necessity on the part of the interfering States, involving their own particular security. That a right of pacific interference, and even of armed intervention, may sometimes grow out of such threatened danger to a particular State, cannot be doubted. So, also, there may be an impending danger, affecting the general security of nations, which may justify an interference on their part, for the security of their own independence and the preservation of peace. But such danger must be threatening and immediate, and not a mere remote contingency ; and even then the interference must be limited to the removal of the danger itself ; beyond that it would be unlawful.<sup>2</sup>

§ 6. But this impending or contingent danger to the general peace of nations, or to the independence of particular States, is more frequently appealed to as an *excuse*, than as a

<sup>1</sup> *Vide post*, ch. xiv. ; Phillimore, *On Int. Law*, vol. i. § 400 ; Wenck, *Codex Juris Gent.* t. i.

<sup>2</sup> Heffter, *Droit International*, §§ 44, 46 ; Manning, *Law of Nations* pp. 97, 98.

Mr. Canning has said that interference is justifiable against a nation which attempts to 'propagate, first her principles, and afterwards her dominion, by the sword, or encourages the subjects of another to resist authority, or assist rebellious projects.'

The interference of a Confederation in the affairs of its own confederate states, may either be looked upon as an exception to the rule of non-interference, or as a sovereign body regulating the affairs of an individual member. The Schleswig-Holstein difficulty of 1863 is an example of this interference. See also pamphlet by Dr. Twiss on the Schleswig-Holstein difficulty of 1848.



*justifiable reason*, for foreign interference in the internal affairs of others. And instead of preserving peace, such unlawful interference has frequently been the cause of wars the most cruel and bloody that have ever stained the annals of history. We scarcely need refer to the wars which resulted from foreign interference in the internal affairs of France in the revolution of 1789, in proof of our assertion. Unfortunately historians and juriconsults are too apt to draw their arguments from the *fact* to the *right*, and to infer the right of interference from the numerous examples of its actual exercise, without testing the legality of the usage by reference to fundamental principles. If foreign interference in the internal affairs of a sovereign State (except in cases of imminent and actual danger to the general or particular security, freedom, and independence of nations) is contrary to natural law, as the fundamental principle of international jurisprudence, usage and custom cannot make it justifiable or lawful, for no length of usage can justify a wrong.<sup>1</sup>

§ 7. That the general rule of natural law is opposed to all interference in the internal affairs of another State, cannot be doubted. It is confirmed by reason, and the concurring opinions of the most eminent publicists of all ages and all nations. It must nevertheless be admitted that there are exceptions to this rule. The principal difficulty is in confining the exceptions so as not to infringe upon the principle of the rule. The general rule, and the possible exception to it, were both very clearly stated by M. de Chateaubriand in his speech in the French Chamber, on the Spanish war

<sup>1</sup> Wheaton, *Hist. Law of Nations*, pp. 80, 88; Vattel, *Droit des Gens*, liv. ii. ch. i. § 7; Bynkershoek, *Foro Legatorum*, cap. ii. § 4; Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. xxv.; *Edinburgh Review*, No. 156, p. 329; Le Louis, 2 *Dod. R.* 257.

A rough outline of what is lawful and what is unlawful in the interference of States might be suggested in the following rules:—Interference in the internal affairs of a State is unlawful; in cases of civil war, or of war between two States, other States may lawfully interfere, but such interference is not *interference* in the true sense of the word, it is an act of hostility, and a State so interfering loses at once all claim of neutrality. See speech of Lord Palmerston, *Parl. Deb.* xxviii. p. 1163. If civil war or internal commotion prevails in a State, and menaces the tranquillity or interests of another State, in a substantial, distinct, and immediate manner, that latter State may interfere with amicable negotiation, or even with arms; and when two States are at war, other States may interfere in a similar manner for the purpose of preserving the balance of power, should it in reality be menaced. See Mr. Canning's *Despatch*, Mar. 31, 1823, *Ann. Reg.*, 1823, *Pub. Doc.*, 140.



of 1823. 'Has,' said he, 'a Government of one country a right to interfere in the affairs of another? This great question of international law has been resolved in different ways, by different writers on the subject. Those who incline to the natural right, such as Bacon, Puffendorff, Grotius, and all the ancients, mention that it is lawful to take up arms in the name of the human race against a society which violates the principles on which the social order reposes, on the same ground on which, in particular States, you punish an individual malefactor who disturbs the public repose. Those who consider the question as one depending on civil right, are of opinion that no one Government has a right to interfere in the affairs of another. I adopt, in the abstract, the principles of the last. I maintain that no Government has a right to interfere in the affairs of another Government. In truth, if this principle is not admitted, and above all by all people who enjoy a free constitution, no nation could be in security. It would always be possible for the corruption of a minister, or the ambition of a king to attack a State which attempted to ameliorate its condition. In many cases wars would be multiplied; you would adopt a principle of eternal hostility—a principle of which every one would constitute himself judge, since every one might say to his neighbour, 'Your institutions displease me; change them, or I declare war.'

'But when the modern political writers rejected the right of intervention, by taking it out of the category of natural to place it in that of civil rights, they felt themselves very much embarrassed at the result; for they saw that cases will occur in which it is impossible to abstain from intervention without putting the State in danger. At the commencement of the revolution, it was said, "Perish the colonies rather than one principle," and the colonies perished. Shall we also say, "Perish the social order rather than sacrifice a principle;" and let the social order perish? In order to avoid being shattered against a principle which they themselves had established, the modern jurists have introduced an exception. They said, no Government has a right to interfere in the affairs of another Government, *except in the case where the security and immediate interests of the first Government are compromised.*'<sup>1</sup>

<sup>1</sup> De Cussy, *Précis Historique*, ch. iv.; Phillimore, *On Int. Law*, vol. i.

§ 8. Another ground of foreign interference in the internal affairs of a sovereign State, advocated by some text-writers, is the obligations of treaty stipulations. There can be no

§§ 390 et seq.; Alison, *Hist. of Europe*, ch. xii. §§ 41 et seq.; *Moniteur*, Feb. 15, 1823, and compare Mons. De Chateaubriand's despatch to Mr. Canning, Jan. 23, 1823, and the answer of Mr. Canning; *Annuaire Historique* (Leseur), 1823, p. 708; *Ann. Reg.*, 1823, *Pub. Doc.*, 110.

The revolution of 1820 in Spain and in Naples called forth a circular despatch from Austria, Prussia, and Russia (the result of the Congress of Troppau and of Laybach), proclaiming their intention to oppose revolution and change of government in Europe. This was based on the principles enunciated in the Congress of Aix-la-Chapelle, 1818, when the five great European Powers, who became parties to the political system established in 1815, engaged 'to be observant of the great principles they profess to recognise as the foundation of this compact, in the various conferences which may from time to time be held, either between themselves or their respective ministers, whether the conference in question be devoted to a common deliberation upon their own affairs, or whether they concern matters in which other Governments shall have formally requested their mediation, the same disposition which is to guide their own deliberations and govern their own diplomatic transactions shall also preside at these conferences, and have for its constant object the general peace and tranquillity of the world.'

In reply to the above circular despatch, the British Government in 1821 declared that no Government was more prepared than their own 'to uphold the right of any State or States to interfere where their own security or essential interests were seriously endangered by the internal transactions of another State. That the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby; that it could not receive a general and indiscriminate application to all revolutionary movements without reference to their immediate bearing upon some particular State or States; that its exercise was an exception to the general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case; and exceptions of this description could never without the utmost danger be so far reduced to rule as to be incorporated into the ordinary diplomacy of States, or into the institutes of the Law of Nations' (*British and Foreign State Pap.*, vol. viii. p. 1128); and the British Government adhered to the same principles at the Congress of Verona the following year, declaring that so long as the Spanish revolution was maintained within the Spanish dominions, there could be no justification for a foreign interference. (*Ann. Reg.*, 1823, *Pub. Doc.*, 93 et seq.) After perusal of the above it is not apparent on what principle of international law Great Britain in 1840, in unison with Austria, Prussia, and Russia, assisted the Sultan Abdul Medjid to reduce Mehemet Ali, the Pasha of Egypt, to obedience, and to interfere in the domestic concerns of a foreign State. France, indeed, refused to take coercive measures against the Pasha. 'If,' said the late M. Thiers, 'the proposals to curtail the power of Mehemet Ali and to divide Syria are persisted in, I shall advise my country not indeed to come to a rupture, but to retire within herself and await the course of events.' The reasons which led to this interference on the part of Great Britain are worthy of the attention of the student, for although, as before suggested, it is difficult to explain the mere facts on the grounds of law, it cannot be doubted but that they were based on a sound policy, owing to the secret Russian intrigues then at work, of which the British Ministry was cognisant. (See *Ann. Reg.*, lxxxii. 162.)



doubt that a sovereign State may guarantee a particular form of government to one of its component parts, as the constitution of the United States of America guarantees a *Republican* form to each State of the federal union ; or, in case of a protectorate, the protecting State may guarantee or direct a particular form of government for the dependent or protected State. But neither the component nor the protected States are in these cases to be regarded as independent sovereignties ; they have parted with some of the essential qualities of sovereignty and independence, and, consequently, are not entitled to the full rights incident to their primary condition as equal members of the society of nations. The same doctrine may apply generally to treaties of unequal alliance. But, in treaties of equal alliance, between independent and sovereign States, will a stipulation of mediation or guaranty justify generally the interference of one State in the internal affairs of another, contrary to the wishes of the latter ? If the interference is in itself unlawful, can any previously existing stipulation make it lawful ? We think not ; for the reason that a contract against public morals has no binding force, and there is more merit in its breach than in its fulfilment.<sup>1</sup>

<sup>1</sup> In 1834 Lord Mahon drew attention in the House of Commons to the assistance given to Spain by Great Britain in putting down the Carlist insurrection in Navarre. Although the moral effect of the Quadruple Alliance had assisted to restore peace to Portugal, the character of Great Britain as regarded Spain was different ; it was no longer a question of succession to a throne, but of an insurrection. He therefore questioned the legality of further British interference in Spain, moreover remarking that even if interference could be justified, it should be by regular British troops, and not, as was the case, by a body of mercenaries, to facilitate whose enrolment the British Foreign Enlistment Act had been purposely suspended. Sir Robert Peel also blamed the policy of England, and after having mentioned that it was the first instance in modern times of intervention by that country in the domestic affairs of a foreign country, disclaimed the right of interference even if for the purpose of insuring permanent benefit to England. 'The general rule,' continued he, 'on which England has hitherto acted is non-intervention, the only admissible exception to it being cases where the necessity is urgent and immediate, affecting, either on account of vicinage or some special circumstances, the safety and vital interests of the State ; to interfere on the vague ground that British interests would be promoted by intervention, or the plea that it would be for our advantage to re-establish a particular form of Government in a country circumstanced as Spain was, is to destroy altogether the general rule of non-intervention, and to place the independence of every weak power at the mercy of a formidable neighbour.'

Lord Palmerston, on the other hand, objected that it was not an interference on the part of Great Britain, but merely a permission to English-



§ 9. Another ground of foreign interference, in the internal affairs of a sovereign State, is that of *humanity*, it being done for the alleged purpose of stopping the effusion of blood caused by a protracted and desolating civil war in the bosom of the State so interfered with. If such interference be in the nature of a pacific mediation, one State merely proposing its good offices for the settlement of the intestine dissensions of another State, there can be no doubt of its lawfulness. How far interference by *force*, or an armed intervention in the internal affairs of another State, may be justified on the ground of humanity, will be considered in another chapter.<sup>1</sup>

§ 10. Again, suppose such interference in the internal affairs of another State be made on the invitation of the contending parties in the civil war? If the invitation be from only one of the contestants, it can, by itself, confer no rights whatever as against the other party. But if both parties unite in the invitation, it will afford just grounds for the interference of the mediating power. How far such invitations will justify an armed intervention between the contending parties, will be discussed in another chapter. It is sufficient to remark in this place, that the opinion or decision of a mediating power, whether the mediation be proffered or invited, is of the nature of advice, or rather of a proposition for an amicable adjustment of existing differences; which proposition may be rejected by one or both of the parties, without just offence to the mediator.<sup>2</sup>

men to assist the Queen of Spain, and added that the interference of the Quadruple Alliance was by virtue of a treaty. 'In the case of a civil war,' said he, 'proceeding either from a disputed succession or from a long revolt, no writer on national law denies that other countries have a right, if they choose to exercise it, to take part with either of the two belligerents. Undoubtedly it is inexpedient to exercise that right except under circumstances of a peculiar nature. The right, however, is general; if one country exercises it, another may: the present measure establishes no new principle, and creates no new danger as a precedent.' (See *Parl. Deb.*, xxviii. 1133-63.)

In 1847, on the refusal of the insurgents in Portugal to accede to such terms as might be advised by Great Britain, France, and Spain, a British squadron, with the concurrence of the Queen of Portugal, was sent to Oporto, and the insurrection by that means was terminated. Lord Palmerston defended this interference on the ground of the necessity of existing facts, particularly the recall of the Portuguese Parliament, and on the claims which Portugal, the old natural ally of Great Britain, had on that country. (*Brit. and Foreign State Papers*, 1846-47, vol. xxxv. p. 1110.)

<sup>1</sup> *Vide post*, note, p. 97, and ch. xiv. § 21.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 25; Phillimore, *On Int. Law*, vol. i. § 395; Martens, *Précis du Droit des Gens*, §§ 176, 327, 330.

§ 11. But if such proffered or invited mediation is of the nature of an arbitration, in which the question of difference is submitted to the decision of the mediating power as an *arbitrator*, with an agreement to abide by such decision, neither party can properly refuse to abide by the result of the reference, unless it be shown that the award has been made in collusion with one of the parties, or that it exceeds the terms of the submission. The general rules governing such arbitrations, are the same as those governing arbitrations between sovereign and independent States, which will be discussed in another chapter.<sup>1</sup>

§ 12. But suppose the award has been made without collusion, and has been confined to the terms of the submission, and that one of the parties should refuse to abide by the decision, although both agreed to do so, will such refusal justify the mediating power in employing force to compel obedience to its decision? To decide this question, it will be necessary to inquire into the particular circumstance of each case. The arbitrator's right to use force, in order to carry his decision into effect, if it exist at all, must be deduced from the terms of the agreement, entered into by the contracting parties to the submission. It does not result as a necessary consequence of his undertaking the office of arbitrator. But this question will be more particularly discussed under the head of *wars of intervention*; we are here considering only the general right of pacific interference, or pacific mediation, in the internal affairs of a State.<sup>2</sup>

§ 13. There are certain cases where the very character of the constitution or government of one State may authorise the interference of another in the choice of its rulers. Such cases, however, are mainly confined to semi-sovereign or dependent States. But the States of the Church have usually been regarded, in the international law of Europe, as sovereign and independent. Nevertheless, Austria, France, and Spain, as Catholic countries, have a voice in the election of the Pope, who is the temporal sovereign of the Roman States, as well as the supreme Pontiff of the Roman Catholic Church.

<sup>1</sup> *Vide post*, ch. xii. § 7; Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 13; Gardien, *De la Diplomatie*, tome i. p. 436; Rayneval, *Droit de la Nat. et des Gens*, liv. iii. ch. xxii.

<sup>2</sup> *Vide post*, ch. xiv. § 12.



But if these spiritual and temporal officers should be separated, the right of foreign States to interfere in the choice of the person to fill the office of civil ruler, might well be questioned.<sup>1</sup> In the case of a composite State, or a confedera-

<sup>1</sup> From the tenor of the following extracts, it would appear that the right possessed by Austria, France, and Spain (and which is also claimed by, although not conceded to, Portugal), is merely the right of *excluding* from, but not of *electing* to, the Papacy. This right of exclusion can only be exercised once, and must be made before a canonical majority be obtained. Its origin is not well known; and from the use of the words 'Supreme Pontiff,' in the form of exclusion, it would appear, although not conclusively, to point to a right of interference in the election of a person to a *spiritual* office only, and not to a civil ruler.

The *Times* (November 5 and 6, 1877) says that the question was at that date being considered at the Vatican, and that the Cardinals at the head of the Sacred Congregation were divided in opinion, whether this right of exclusion was not lost to the above Powers in consequence of their apathy at the downfall of the Temporal Power.

Before the election of Leo XII., the Sardinian Ambassador at Rome, writing, in 1823, to the Minister of Foreign Affairs at Turin, relative to the Conclave, says, 'L'influence que les Cours ont dans l'élection du Pape se réduit essentiellement au droit d'exclusion, droit qui n'est fondé que sur une consuetude dont l'origine n'est pas bien connue.'

In 1823, the King of Naples, in his instructions to Cardinal Ruffo, relative to the Conclave, says, 'The right does not appertain to the Crown of the Kingdom of the Two Sicilies of *express exclusion*, since it is only reserved to the Courts of France, Spain, and Austria: we trust to your ability, that you will employ all the means which your talents suggest to you, to make the *tacit exclusion* prevail.'

The following is the form of exclusion made use of by Cardinal Albani, on behalf of Austria, against the election of Cardinal Severoli:—'September 21, 1823.—In my capacity of Ambassador extraordinary to the Sacred College assembled in Conclave, which capacity has been signified to, and known by, Your Eminences as much by means of the letter which has been addressed to you by His Imperial Majesty, as by the notification which to Your Eminences has been made by His Imperial Ambassador, and by virtue of the instructions which have been given to me, I fulfil the displeasing duty of declaring that the Imperial Court of Vienna cannot accept for Supreme Pontiff His Eminence Cardinal Severoli, and gives to him a formal exclusion (*esclusiva*).—Bianchi, *Storia della dipl. Europ. in Ital.*, vol. ii.

In 1831, Cardinal Giustiniani was excluded by Spain. ('*Memorie dei Conclavi da Pio VII. a Pio IX.*,' Cipoletta, Milano, 1863.)

Instructions of the French king, Charles X., to the French Cardinals going to the Conclave in 1829:—'. . . Elle n'a point à proprement parler de plan formé pour élever sur la chaire pontificale, ou pour en exclure, tel ou tel membre du Sacré Collège. Elle regretterait même d'avoir à donner une exclusion formelle et authentique; mais ce n'est pas moins un cas à prévoir; et cette nécessité se présenterait si la majorité des voix menaçait de se déclarer en faveur d'un sujet dont les préjugés personnels, un zèle aveugle, un caractère intolérant et inquiet, et surtout l'habitude de dépendre de telle ou telle grande puissance seraient susceptibles de faire pressentir à l'Eglise une administration dangereuse aux Gouvernements étrangers, et à la France en particulier, des complications et des embarras de plus d'un genre. . . '

It does not appear necessary that a Pope be selected either from the



tion of several States, the right of one State to interfere in the affairs of another, or of the supreme Government to interfere with that of one of its constituents, will depend upon the constitution or plan of confederation ; it does not result from any general right in sovereign States, as recognised by international law.<sup>1</sup>

§ 14. Another incident to the sovereignty of a State is its independence of every other in its legislative power, so far as such independence does not conflict with the sovereign rights of other States, and is not limited or modified by acts of union or the stipulations of treaty. There is, however, properly speaking, no conflict in laws relating to *public* international jurisprudence, so long as each sovereign State confines its legislation within its own proper and legitimate limits, that is, to the regulation of the rights and duties of its own subjects *inter se*, and in their relations to their own government. But in what is called *private* international law, which regulates the rights of individuals of one State with respect to the laws and institutions of other States, there is not unfrequently a *conflict of laws*. A consideration of this subject belongs to another chapter.<sup>2</sup>

§ 15. So, also, every sovereign State is independent of every other in the exercise of its judicial power, which, subject to the exceptions already mentioned, is coextensive with its legislative power. At the same time, this power does not embrace cases where the municipal institutions of another nation operate within its territory, as in cases of a public minister, a foreign fleet or army, rights of extritoriality conceded by treaty, &c. But these questions will be more particularly discussed elsewhere.<sup>3</sup>

ranks of the Cardinals, or that he be in Orders. At the election of a new Pope, in 1758, votes were given in favour of Father Baberini, General of the Capuchins, who was not a Cardinal (Novaes, *Storia dei Pont.*, vol. xiv. 8), and Moroni (vol. xxxi.) distinctly relates that John XIX. was only a lay brother.

The usual observance has been not to proceed with a ballot for a new election until the tenth day after the decease of the former Pope, but this custom could evidently be set aside in case of urgency or necessity.

<sup>1</sup> Mayer, *Corpus Juris Germ.* lib. ii. p. 196 ; Martens, *Précis du Droit des Gens*, § 76 ; Garden, *De la Diplomatie*, tome i. pt. iii. § 6 ; *Acte Final du Congrès de Vienne*, art. 74 ; *Constitution of the United States*, art. 3.

<sup>2</sup> *Vide post*, ch. vii. §§ 1 et seq. ; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 1 ; Foelix, *Droit International Privé*, § 3 ; Rayneval, *Droit de la Nat.* etc. liv. i. ch. xi. ; Riquelme, *Derecho Pub. Int.* lib. ii. tit. i. cap. i.

<sup>3</sup> Bynkershoek, *De Foro Legat.* cap. iii. ; Casaregis, *Discursus, Leg.*

§ 16. Every sovereign State being independent of all others in the exercise of its legislative and judicial powers, it follows as a necessary consequence, that it is also independent of all others in the rewards and punishments of its own subjects. It may make its own laws defining offences, organise its own tribunals for trying them, and for awarding punishments to its own subjects, and it may inflict its punishments upon its own subjects found in its own vessels upon the high seas, or within its own territorial jurisdiction. Moreover, its laws and penalties follow its citizens into all places and all countries ; but it can neither arrest nor punish them within the territorial jurisdiction of a foreign State, except where such a right is conceded by treaty stipulations.<sup>1</sup>

§ 17. The case of Martin Koszta, in 1853, and the discussions resulting from his seizure and forcible release, have given to the foregoing rule of international law a prominent position in the public mind. Koszta, a Hungarian banished from Austrian dominions for political offences, had acquired a domicile and taken the preliminary steps to naturalisation in the United States. While thus [partly] clothed with the national character of the United States, his business called him to the Turkish port of Smyrna, where he was seized by Austrian agents, and confined in an Austrian vessel of war, the 'Husza,' preparatory to transportation to the Austrian port of Trieste. The Turkish authorities not only disavowed this act of Austrian officials, but protested against their conduct as in violation of Turkish sovereignty. Under these circumstances, the captain of the United States vessel of war, the 'St. Louis,' demanded and enforced Koszta's release from the Austrian vessel. Austria not only demanded a disavowal by the United States of the acts of the American agents, and satisfaction for what she deemed an offence to her own flag, but also sent a circular to other European courts, complaining of the rescue of Koszta as a violation of international law. All these allegations were most clearly and satisfactorily disproved in the masterly despatch of Mr. Marcy, the American Secre-

pp. 136, 174 ; *The Exchange v. Mc Faden*, 7 *Cranch. R.* 135 ; Gardén, *De la Diplomatie*, tome i. pt. iii. § 7 ; Bello, *Derecho Internacional*, pt. i. cap. iv. § 4 ; Rayneval, *Droit de la Nat.* etc. liv. i. ch. xi. ; and see ch. x. § 13.

<sup>1</sup> Huberus, *Prælect.* tome ii. liv. i. tit. iii. ; Rose *v. Himely*, 4 *Cranch. R.* 278. See ch. vii. § 28, on the extradition of criminals.



tary of State, to the Austrian Chargé d'Affaires, in which it was shown that Austria had been the real aggressor, and that the United States had made no intentional encroachment upon the sovereign territorial rights of Turkey. Had that power been able to protect the integrity of her soil from Austrian encroachment, in the seizure of a person [partly] clothed with American nationality, there would have been no occasion for the interposition of American authority for the protection of that person. But in her own inability to protect the rights of Americans against Austrian aggression, she assented to and approved the acts of the American agents in doing so themselves; and certainly if she was satisfied, others had no right to complain in a matter which in no way affected them. Baron de Cussy, in reviewing this transaction, has not duly considered this point, nor indeed has he correctly and fully stated the true facts and circumstances of the case. In answer to the charge of a violation of international law by the United States, with respect to Turkey, Mr. Marcy said: 'Before closing this communication, the undersigned will briefly notice the complaint of Austria against Captain Ingraham, for violating the neutral soil of the Ottoman Empire. The right of Austria to call the United States to an account for the acts of their agents, affecting the sovereign territorial rights of Turkey, is not perceived, and they do not acknowledge her right to require any explanation. If anything was done at Smyrna in derogation of the sovereignty of Turkey, this government will give satisfactory explanation to the Sultan when he shall demand it, and it has instructed its minister resident to make this known to him. He is the judge, and the only rightful judge, in this affair, and the injured party too. He has investigated its merits, pronounced judgment against Austria, and acquitted the United States; yet, strange as it is, Austria has called the United States to an account for violating the sovereign territorial rights of the Emperor of Turkey.'<sup>1</sup>

§ 18. Another right immediately resulting from the independence of sovereign States, is that of *self-preservation*. This is one of the most essential and important rights incident to

<sup>1</sup> *Marcy to Hulsemann*, Sept. 26, 1853; Cong. Doc. 33d Cong. 1st sess. Sen. *Ex. Doc.* No. 1; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 5, note (a); De Cussy, *Droit Maritime*, liv. ii. ch. xii. § 12.



State sovereignty, and lies at the foundation of all the rest. It is not only a *right* with respect to other States, but a *duty* with respect to its own members, and one of the most solemn and important duties which it owes to them. 'The right of self-preservation,' says Phillimore, 'is the first law of nations as it is of individuals. A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution.'

§ 19. This right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end. And other nations have no right to prescribe what these means shall be, or to require any account or explanation of the conduct of a sovereign State in this respect, except so far as their own peace and safety may be affected or threatened. The means usually resorted to for this purpose are the construction of fortifications, the organisation of military and naval forces, and the contraction of alliances with other States. 'The full liberty of a nation in this respect,' says Phillimore, 'cannot, as a general principle of international law, be too boldly announced or too firmly maintained.'<sup>1</sup>

§ 20. But the exercise of these incidental rights may be modified or controlled by special compacts freely entered into with other States. Thus, by the treaties of 1748, and 1763, France engaged to demolish the fortifications of Dunkirk, and this stipulation, so humiliating to the French nation, was not effaced till the treaty of 1783. Again, by the treaty of 1815, France engaged to demolish the fortifications of Huningen, and never to renew them nor to replace them by other fortifications within three leagues of the city of Bâle. By the treaty of 1856, between Russia, Turkey, and the allies, the former stipulated to relinquish her right to construct military-marine arsenals, and to maintain a naval force in the Black Sea. All such compacts, when freely entered into, are binding, notwithstanding that they limit the natural rights of independent States.<sup>2</sup>

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. §§ 210, 211; Wheaton, *Elem. Int. Law*, pt. ii. cc. i. ii. § 2; Polson, *Law of Nations*, sec. 5.

<sup>2</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 2; Martens, *Recueil des Traittés*, tome ii. p. 469; Phillimore, *On Int. Law*, vol. iii. Appendix, pp. 828 et seq.; Ortolan, *Diplomatie de la Mer*, tome ii. App. special; Heff-

§ 21. These incidental rights may also be modified, or limited, by the equal and corresponding rights of other States. If, under the plea of self-defence, a nation makes extraordinary warlike preparations, inconsistent with pretended pacific intentions, and threatening to the peace and independence of others, such threatened States may very properly demand an explanation, and if none of a satisfactory character is given, require a discontinuance of such hostile demonstrations. Such hostile preparations, if not satisfactorily explained, may become a matter of serious complaint, but seldom, if ever, in themselves alone a just cause of war.

§ 22. A distinction, however, must be made between those means and preparations for self-defence, which are exclusively *defensive*, and those which, from their nature, may also be regarded as offensive. Thus an extraordinary increase of the military and naval forces of a State, may be calculated to alarm other nations whose peace and security they may appear to menace. It is, therefore, usual under such circumstances, to require and to receive amicable explanations of such warlike preparations. And if asked for in a proper tone and spirit, the explanation cannot be properly refused, without giving offence, or, at least, well-founded cause for suspicion.<sup>1</sup>

§ 23. Not so, however, with respect to the erection and arming of fortifications, which are essentially means of defence and self-preservation. That such works are of immense assistance in carrying on military and naval operations against others, cannot be doubted, but they cannot of themselves be injurious or dangerous to foreign powers. They, therefore, are not just causes of complaint by others. The same may be said of military schools, and a general diffusion of military education and military science among the subjects of a State. They are legitimate and proper means of self-preservation, which every sovereign State has a perfect right to use; and others have no right to require an account of its conduct in this respect.<sup>2</sup>

ter, *Droit International*, Appendice; De Cussy, *Précis des Evénements*, ch. xii.; French treaty with Germany, 1871; and see ch. vi. § 21, note.

<sup>1</sup> Martens, *Précis du Droit des Gens*, §§ 117, 118; Pinheiro Ferreira, *Com. sur Martens*, tome i. Note 62; Moser, *Versuch*, etc. t. vi. pp. 409, 413; Gunther, *Europ. Völkerrecht*, b. i. pp. 293-319.

<sup>2</sup> Jomini, *Précis de l'Art de la Guerre*, ch. ii. sec. i. § 1; Halleck, *Elem. Mil. Art and Science*, ch. iii.



§ 24. The means of self-preservation which we have hitherto considered as the right of a sovereign State to resort to, are such as are made *within* its own dominions, or on the high seas. It has been contended by some that, for the same reasons, a State may extend its precautionary measures *without* its own territorial limits and within the borders of a neighbouring State. Sir R. Phillimore describes a hypothetical case which would come under this pretended rule of international jurisprudence. 'A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous State, and from thence, with restored strength and fresh appliances, renew their invasions upon the State from which they have escaped. The invaded State remonstrates. The remonstrance, whether from favour to the rebels, or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed. In this state of things, the invaded State is warranted, by international law, in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require.' This is certainly a very extraordinary pretension; let us examine the reasons by which it has been attempted to sustain this right of extra-territorial jurisdiction.<sup>1</sup>

§ 25. Sir R. Phillimore has himself pointed out what he conceives to be the principle of international law from which he derives this pretended right of one State to transgress the borders of its neighbour's territory in time of peace, not as an act of hostility, but as a kind of pacifico-belligerent right of territorial violability; pacific with respect to the *State* whose territory is invaded, and belligerent with respect to the *particular powers and places* attacked or destroyed. 'International law,' he says, 'considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former, at the expense of the latter right.' The words of the same author, in another place, furnish a complete answer to his argument, viz.: 'The policy which seeks to establish one principle of international law upon the ruin of others, has

<sup>1</sup> Phillimore, *Letter to Lord Ashburton*, pp. 27 et seq.



been, and always must be, a policy as fatal to the lasting peace of the world as the attempt to promote one moral duty at the expense and by the sacrifice of others, is, and must be, fatal to the peace of an individual.<sup>1</sup>

§ 26. The defect of Sir R. Phillimore's argument consists in the assumption of a false principle for its basis, and his erroneous premises necessarily lead him to an erroneous conclusion. There can be no conflict of rights, *stricti juris*, between States in time of peace. No such principle is admitted in the code of public international law. It is a maxim of that law, that every right is followed by corresponding duties and obligations. If, therefore, one State has a right to violate the territory of a neighbour, in time of peace, for what it sees fit to consider the purposes of self-defence, that neighbour is bound to permit its territory to be so violated as often as the other party may conceive that the necessity exists. But it is an established principle, that every sovereign State has a right to protect the inviolability of its own territory, and that any invasion of it is an act of hostility, which may be repelled by force. So, the other party may also enforce, with arms, if need be, its own right of territorial transgression, incident to its paramount right of self-defence! Here, then, we have force repelling force in the pacific exercise of established public international rights! This is the legitimate and necessary consequence of Sir R. Phillimore's argument. Its defects are too manifest to require any extended discussion.<sup>2</sup>

§ 27. But it may be asked, shall the State, which is suffering from the piratical incursions organised in, and emanating from a neighbouring State, do nothing in self-defence, and for self-preservation? Must she wait till the invading force crosses her own borders, before she can attack or destroy it? Not at all. If the neighbouring State, from the want either of the will or of the ability, neglects to prevent such excursions, or to suppress such organisations, the threatened State may cross

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. §§ 213, 218, 398. But Sir R. Phillimore in the same passage quotes Vattel, lib. iii. c. vii. s. 133, in support of his opinion; further, he illustrates the hypothetical case by the facts given in the case of the 'Caroline' (*Ann. Reg.* 1841, p. 310), and concludes that if the version given by the British Government be correct, the complaint of violation of territory, made by the American Government, was vindicated by Great Britain on the ground of self-preservation.

<sup>2</sup> Webster, *Off. and Dip. Papers*, pp. 104-120, 140-222; Wildman, *Int. Law*, vol. i. ch. ii.

the frontier and attack or destroy the threatened danger. But the act is one of *hostility*, and she performs it in the exercise of her *belligerent rights*, not in the exercise of a pacific right of self-defence. It is not necessary that such act should be preceded by a declaration of war, nor, indeed, that it should be followed by a public and solemn war in form; nevertheless, it is a belligerent act, justifiable, perhaps, by the circumstances of the case and the culpable neglect of the other party, and as such, belongs to that class of hostile operations known in international jurisprudence as *imperfect war*, and which will be more particularly discussed in another chapter.<sup>1</sup>

<sup>1</sup> See *post*, ch. xvi.; Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 13; Burlamaqui, *Droit de la Nat.* etc. tome v. pt. iv. ch. iii.; Vattel, *Droit des Gens*, liv. ii. ch. vi. § 72.

The emancipation of Greece by the arms of Great Britain, France, and Russia, in 1827, from the Government of Turkey is difficult to justify on the grounds of International Law. 'The emancipation of Greece,' says Sir William Harcourt, 'was a high act of policy above and beyond the domain of law. As an act of policy it may have been and was justifiable; but it was not the less a hostile act, which if she had dared Turkey might properly have resented by war.' (*Letters of Hist.* p. 6.) It should be observed that Greece had revolted against her lawful ruler, and that the power and authority of that ruler had never fallen into abeyance, nor been subdued or overcome by the insurgents; but it may be argued in favour of the intervention of the three powers, and on which indeed the same was based, that humanity demanded their interference to stay further bloodshed, that the state of piracy which prevailed, endangered the commerce of neutrals, and that the anarchy was such that Turkey was unable to repress it. Another ground on which the intervention was based was, that it was by request of Greece. (*Parl. Debates*, second series, xv., xviii., xix., xxii., xxv.; *British and Foreign State Papers*, 1816-30, xiv. p. 629-xvii. p. 191.)

In 1860, the British Government refused to acquiesce in the suggestion of France that they should jointly prevent Garibaldi from crossing into the Neapolitan territory, and declared that it was for the Neapolitans to say if they would receive him or not; further that an armed intervention to stop the expedition of Garibaldi would contradict the principle which Great Britain had long professed 'of not interfering in the internal concerns of foreign countries.' (*Parl. Papers*, 1860.) The Sardinian Government, however, interfered, but on the side of the insurgents, with the declaration of a desire 'to maintain order and to wish to make the will of the people respected.'

The same year the inhabitants of Umbria and the Marches threw off the Papal Government, and proclaimed Victor Emmanuel their King. On the insurgents being attacked by the Papal troops under General Lamoricière, the Piedmontese troops threatened to occupy those provinces 'if the Papal troops attempted to repress by force any manifestation of the inhabitants in the national sense,' and Count Cavour declared that Sardinia would invade the Papal States unless the Pope disbanded his foreign legions. (Cavour to Antonelli, September 7, 1860.) In consequence of the refusal of the Papal Government to accede to such a proposal, Sardinia intervened with an armed force, on the ground of the dangers

to which northern Italy was exposed owing to the state of affairs on the Papal territory, of the desire of the inhabitants for a change of government, of the obligations on Sardinia, and on Europe respectively, to influence the national movements to repress disorder. This was followed by the annexation of the territory to Sardinia. These proceedings were strongly disapproved of by several of the principal Courts of Europe. France and Russia withdrew their Ministers from Turin; Prussia and Austria conveyed the sense of their displeasure to the same. Great Britain, however, could see no sufficient ground for the severe censure with which those States visited the acts of the King of Sardinia. 'Did the people of Naples and of the Roman States take up arms against their Governments for good reasons? Upon this grave matter,' says Lord John Russell (writing to Sir J. Hudson, October 27, 1860), 'Her Majesty's Government hold that the people in question are themselves the best judges of their own affairs. I therefore cannot blame the King of Sardinia for assisting them.'



## CHAPTER V.

## RIGHTS OF EQUALITY.

§ 1. Natural equality of sovereign States—2. Consequences of this equality—3. Titles of States and of their rulers—4. Effect of custom and treaty upon rights of equality—5. Case of the Pope and Emperor of Germany—6. Rights and precedents of rulers and representatives of States—7. Examples of disputes, and the mode of arranging them—8. Royal honours—9. Emperors and kings—10. Monarchical sovereigns—11. Semi-sovereign and dependent monarchical States—12. Rank of republics—13. General rule of equality and precedence—14. Usage of the Alternat—15. Language of diplomatic intercourse and treaties—16. Military and maritime ceremonials—17. How regulated—18. Maritime ceremonials in the narrow seas—19. In foreign ports and on the high seas—20. Treaties respecting salutes, etc.—21. General rules established by text-writers—22. Salutes between ships and forts—23. Ships in foreign ports—24. Regulations as to salutes in the British navy—25. French naval regulations—26. Spanish regulations—27. U. S. army and navy regulations—28. Difficulties in the application of these rules—29. May be avoided by making all salutes international.

§ 1. 'NATIONS,' says Vattel, 'composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign State than the most powerful kingdom.' In other words, all sovereign States, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations. One of the fundamental principles of public law, generally recognised, says Sir William Scott, is the perfect equality and independence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour, and any advantage seized on that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their political and private capacities, to preserve inviolate.

§ 2. A necessary consequence of this equality of sovereign States is the general rule of public law, that, 'whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.' Vattel, in discussing the sovereignty and independence of States, says that the effect of such a *status* 'is to produce, at least externally and among men, a perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that what is permitted in one is also permitted in the other, and they ought to be considered, in human society, as having equal rights.'<sup>1</sup>

§ 3. Another necessary consequence of this equality is the rule that all sovereign princes and States may assume whatever titles of dignity they think fit, and may exact from their own subjects the corresponding marks of honour. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity assumed by sovereigns. Thus, the royal title of King of Prussia assumed by Frederick I., in 1701, was not acknowledged by the Pope until 1786, nor by the Teutonic knights until 1792. So, also, the title of Emperor of all the Russias, assumed by Peter the Great, in 1701, was first acknowledged by France in 1745, by Spain in 1759, and by Poland in 1764. A similar delay has been made by more modern States in the recognition of the new titles of higher dignity assumed by sovereigns of other States.<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, prelim. §§ 18, 21; the 'Louis,' 2 *Dod. R.* 243; the 'Antelope,' 10 *Wheat. R.* 120.

<sup>2</sup> On January 18, 1871, a Royal proclamation, read out to the Upper and Lower Houses of the Prussian Diet, announced that the King of Prussia having been addressed by the German princes and Free Towns in a unanimous call to renew and undertake, with the re-establishment of the German Empire, the dignity of Empire which then for sixty years had been in abeyance, and that the requisite provisions having been inserted in the constitution of the German Confederation, he regarded it as a duty to the entire Fatherland to comply with the call of the united German princes and Free Towns, and to accept the dignity of Emperor, for himself and successors.

In 1876, Mr. Disraeli asked the House of Commons to pass a bill which would enable Her Majesty, Queen Victoria, by proclamation, to make that addition to her style and titles which befitted the occasion; that at the time of the union with Ireland, in the Act of Union itself, there was a proviso enabling the sovereign, when the act was passed, to announce by proclamation under the great seal the style and title he



§ 4. Where, however, we wish to promote a friendly intercourse with another nation, or to have another State recognise the titles we have conferred on our public officers, we cannot very well refuse to acknowledge those which it has given to its rulers; so, also, with respect to honours and distinctions claimed as due to such rulers, policy, friendship and fear have not unfrequently induced certain States to yield the precedence to others. This has caused the establishment in Europe, at different periods, of different regulations with respect to foreign would assume; that George III. issued a proclamation accordingly, and adopted the style of King of the United Kingdom of Great Britain and Ireland and its dependencies; that such a course would give great satisfaction to the Princes and nations of India, and would show in an unmistakeable manner that the House looked upon India as one of the most precious possessions of the Crown, and their pride that it was a part of Her Majesty's Empire and governed by Her Imperial Throne. After considerable debates on the subject, Mr. Disraeli gave the pledge that 'under no circumstances would Her Majesty assume by the advice of Her Ministers the title of "Empress" in England,' nor would the Princes of the blood Royal be designated 'Imperial,' or bear any title denoting an Imperial connection.

On April 27, 1876, the 39 Vict. c. 10 was passed, being 'An Act to enable Her Most Gracious Majesty to make an addition to the Royal Style and Titles appertaining to the Imperial Crown of the United Kingdom and its Dependencies.' On the following day, a Royal Proclamation, after reciting the terms of the above act, proceeds to say that 'we, with the advice of our Privy Council, appoint and declare that henceforth so far as conveniently may be on all occasions and in all instruments wherein our style and titles are used, save and except all charters, commissions, letters patent, grants, writs, appointments, and other like instruments, not extending in this operation beyond the United Kingdom, the following addition shall be made,' in these words, "Indiæ Imperatrix," "Empress of India." It further proceeds to provide that all money then or to be current in the United Kingdom shall, notwithstanding such addition, be lawful, and the same as to the dependencies.

In the Act of Henry VIII., the Crown of England is described as Imperial.

When the Holy Roman Empire existed and the German Emperor was crowned at Rome and called Cæsar, the princes of Germany who were his feudatories acknowledged his supremacy, whatever might be his title. But the great Kings, such as those of England, France, and Spain, never acknowledged his supremacy.

Peter the Great of Russia changed his title from Czar to Emperor, but the change was only recognised by England. In 1745 Elizabeth of Russia announced her intention to be termed Empress instead of Czarina, and the new title was recognised by all the Governments of Europe, on condition that she should sign a *reversal* or letter acknowledging that she thereby made no difference in etiquette and precedence. Peter III. also wrote a reversal. Catherine II. refused to do so, but issued an edict to her subjects announcing that notwithstanding her title she only wished to rank with the other sovereigns. It was attempted at the Congress of Vienna to classify sovereigns, but the attempt failed and the equality of crowned heads was then and has henceforth been acknowledged. See § 12, p. 105.



ceremonial. This ceremonial is founded, in part, upon custom and, in part, upon the stipulations of conventions and treaties. There can be no doubt that the natural equality of sovereign States may be modified by the consent which is implied from constant usage, or by positive compacts voluntarily entered into, so as to entitle one State to a superiority over another in respect to external matters, such as rank, titles, and other ceremonial distinctions.<sup>1</sup>

§ 5. Thus the Catholic Powers concede the precedence to the Pope, as the visible head of the Church; but Russia, and the Protestant States of Europe, consider him only as a sovereign prince in Italy, and, as such, entitled to royal honours but not to any precedence from his rank as sovereign pontiff. The Emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne, and of the Cæsars, but the claim is considered to have been lost by the dissolution of the Germanic Constitution, and the new organisation of the Austrian Empire.<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. iii. § 37; Ortolan, *Diplomatie de la Mer*, liv. i. ch. iii.; Bello, *Derecho Internacional*, pt. i. cap. xviii. § 1.

Although the Pope is now dispossessed of territory, it was expressly declared by the Italian Government, in the terms of the Royal Decree of October 9, 1870, that he should preserve the honours of a sovereign and all other prerogatives of a reigning prince, and his precedence will undoubtedly continue to be recognised by Catholic sovereigns. Papal nuncios or ambassadors are still sent to, and received by, Catholic States.

On September 20, 1870, Rome was taken possession of by the Italian troops under General Cadorna. The transfer of the capital from Florence to Rome was afterwards voted by 192 against 18. The following arrangements were made as regards the Pope:—He was guaranteed his sovereign rights, allowed to retain his guards, and provided with an income of 3,255,000 francs. He was to keep the Vatican, the Church of Santa Maria Maggiore, Castel Gandolfo, and their dependencies; these were exempted from taxes and from common law jurisdiction; the same immunity was extended to any temporary Presidency of the Pope, or Conclave or Council; the Pope's correspondence to be free; in pursuit of criminals neither visits nor searches to be allowed; the Pope to establish, if he wished, at the Vatican a post and telegraph office, choosing his own officials; Papal despatches, couriers, and telegrams to be conveyed as those of foreign Governments; Councils to require no preliminary permission for meeting; the Pope to prefer to benefices without the Royal permission; the oath of the bishops to the King, the Royal Placet, and Exequatur were abolished; seminaries and other Catholic institutions to derive their authority from the Pope alone, without interference of Italian authorities. A credit of 17,000,000 lire was demanded by the Government.—*Ann. Reg.*, 1870, p. 279.

<sup>2</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. iii. § 3; Martens, *Précis du Droit des Gens*, §§ 125, 132; Klüber, *Droit des Gens*, pt. ii. tit. i. ch. iii. § 95; Polson, *Law of Nations*, sec. v.; Gunther, *Europ. Völkerrecht*, B. i. p. 222.

§ 6. The sovereign or ruler of a State is considered, in international law, as representing, in his person, its sovereign dignity. It matters not whether he is a monarch or a president, whether he is the *de facto* or the *de jure* head of a nation (if he has been duly recognised as such), custom has invested his person with certain international rights, as the representative of his State. He is therefore entitled to the precedence and honour due to the nation of which he is the ruler. But as sovereigns and rulers seldom meet in council, questions of this kind do not often arise between them individually. There, however, were no less than five such congresses between 1814 and 1821, viz.: the congress of Vienna, 1815; of Aix-la-Chapelle, 1818; of Troppau, 1820; of Verona, 1820; and of Laybach, 1821. As all matters of etiquette and precedence in such congresses are usually arranged before the meeting of the sovereigns, questions of precedence are not likely to arise in the congress itself. Difficulties of this kind, in former times, not unfrequently arose between public ministers who were considered as representing the sovereignty of their respective States, and who consequently claimed honours which others were unwilling to concede. This led to serious disputes, which were sometimes attended with fatal consequences.<sup>1</sup>

§ 7. We find numerous examples of these disputes in European diplomacy of past ages, some of a serious character, and others exceedingly ludicrous. Thus, at the public entry of the Swedish Ambassador into London, a contest for precedence took place between the French and Spanish ambassadors, which was attended with loss of life on both sides, and probably would have led to war, if the king of Spain, who was interested in maintaining peace with France, had not made such concessions as to satisfy the pride of Louis XIV. Again, the ambassadors of two Italian princes met on the bridge at Prague, and as neither would give way, they stood for the greater part of the day, face to face, exposed to the jeers of the crowd collected by the strangeness of the spectacle. Such disputes, sometimes serious and sometimes ludicrous, have led to the adoption, at different times, of certain conventional rules of etiquette and precedence. These rules are binding only upon those who have agreed to them. They,

<sup>1</sup> Phillimore, *On Int. Law*, vol. ii. §§ 39, 101, 102; Heffter, *Droit International*, § 55; De Cussy, *Précis des Evénements*, passim.



however, serve as a basis for the adjustment of any disputes which arise between others who are not parties to these conventional agreements.<sup>1</sup>

§ 8. The customary law of European nations has attributed to certain States what are called *royal honours*, which entitle the States, by whom they are possessed, to precedence over all others who do not enjoy the same rank, with the exclusive privilege of sending to other States public ministers of the first rank, together with other distinctive titles and ceremonies. Among the princes who enjoy these honours, differences have arisen with respect to relative rank and precedence; but these questions are now mostly settled by usage and treaty stipulations, and where not thus settled, they are regarded as of very little importance, or at least, of not sufficient consequence to lead to very serious national differences or discussions.

§ 9. The title of emperor, from the historical associations connected with it, was formerly considered as the most eminent and honourable among all sovereign titles; but it is not now regarded by other crowned heads as conferring any prerogative or precedence over monarchical sovereigns of another name, ruling States of equal rank and dignity. The title of king is now considered as equal in every respect to that of emperor. In fine, the influence and importance of the sovereign result rather from the rank and importance of the State, than from the name and nature of the title conferred upon its ruler.<sup>2</sup>

§ 10. Among monarchical sovereigns, those who enjoy royal honours, but are not crowned heads, concede the preference, on all occasions, to emperors and kings; and the princes who do not enjoy royal honours yield the precedence to those who are entitled to them. This rule is based on the consent of the parties themselves, and does not extend to their intercourse with other States. That is, a State whose ruler does not wear a crown, may give precedence to one which does, but this concession does not preclude the same State from claiming equal rank with a third power which contests the

<sup>1</sup> Wicquefort, *L'Ambassadeur*, etc. liv. i. § 24; Villefort, *Privilèges Diplomatiques*, passim.

<sup>2</sup> Martens, *Précis du Droit des Gens*, § 127; Klüber, *Droit des Gens Mod.* § 95; Polson, *Law of Nations*, sec. v.; Martens, *Guide Diplomatique*, tom. i. §§ 65, 66; Garden, *De Diplomatie*, tom. i. p. 355.



right of precedence with the State to which it had yielded that honour.<sup>1</sup>

§ 11. In all matters of ceremony and etiquette, the representatives of semi-sovereign or dependent monarchical States rank below the representatives of sovereign and independent monarchical States, and, of course, and as a matter of necessity, below those of the State on which they are dependent, or whose protection or *suzeraineté* they claim or acknowledge. But where third parties are concerned, their relative rank must be determined by other considerations; and they may even take precedence of States completely sovereign, as was the case with the electors under the former constitution of the Germanic empire, in respect to other princes not entitled to royal honours.<sup>2</sup>

§ 12. It will be observed that these regulations for determining the relative rank of States, or of their representatives, established in part by usage and custom, and in part by the Congress of Vienna in 1815, relate exclusively to monarchical sovereigns. An abortive attempt was made at the same congress to classify the different States of Europe, with a view to determine their relative rank. A committee was appointed for this purpose in December, 1814; their report was discussed in February, 1815, and its adoption indefinitely postponed, doubts having arisen with respect to the proposed classification, and especially as to the rank assigned to republics. It therefore appears that republics have no definite rank assigned to them by the rules of ceremonial etiquette in Europe, in the intercourse of their representatives with those of monarchical sovereigns.<sup>3</sup>

§ 13. It may be stated, as a general rule resulting from the natural equality of States as members of a universal community, and subject alike to the same general code of international jurisprudence, that all sovereign States, no matter what may be their form of government, are equal before the law, and no one can claim any superiority or precedence over another. Republics are, therefore, entitled to the same rank as monarchies, unless they themselves have yielded their natural

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. iii. § 3; Phillimore, *On Int. Law*, vol. ii. § 41; Heffter, *Droit International*, § 53.

<sup>2</sup> Horne, *On Diplomacy*, sec. i.

<sup>3</sup> Bello, *Derecho Internacional*, pt. i. cap. xviii. § 3; Klüber, *Acten des Wiener Congresses*, tome viii. pp. 98-116.

right of equality and conceded the precedence to others. Formerly, the Roman Republic considered all kings as very far beneath it ; but when the monarchs of Europe found none but feeble republics to oppose, they disdained to admit them to an equality. Nevertheless, the powerful Republics of Venice and of the United Provinces assumed the honours of crowned heads. Cromwell would not allow the slightest mark of honour which had been paid to the representatives of the monarchy to be omitted toward those of the Republic of England. In the treaties between the French Republic and the other European Powers, it was expressly stipulated that the same ceremonials, as to rank and etiquette, which had been observed before the revolution of 1789, should be continued between them. The States of Europe observed the same rule toward the recent Republic of France. The United States of North America, the Germanic Confederation, and Switzerland (collectively, not in its individual cantons), have been considered as entitled to the same rank as the monarchical States of Europe.

§ 14. Where the rank of different States is equal or undetermined, resort has sometimes been had to the usage of the *alternat*, as it is called, by which the rank and places of different powers is changed from time to time, either in a certain regular order, or one determined by lot. Thus, in drawing up certain treaties and conventions, it is the usage of certain powers to *alternate*, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Another expedient, sometimes resorted to in order to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the alphabetical order of the names of the respective States which are parties to these acts, the French alphabet being adopted for that purpose. Thus, at the Congress of Vienna, in 1815, the plenipotentiaries signed in the following order : Austria, Denmark, Espagne (Spain), France, Great Britain, Prussia, Russia, Sweden ; but it was distinctly understood, at the time, that this practice was not to be taken as derogating from the ancient usage of the *alternat*.

§ 15. At one time the Latin language was used as a matter of general convenience in the diplomatic intercourse between the different nations of Europe. Toward the end of



the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, in the age of Louis XIV., was superseded by the French language, which became the almost universal diplomatic idiom of the civilised world. The primitive equality of States authorised each nation to make use of its own language in treating with others, and this right is still preserved in the practice of many States: each carrying on its diplomatic correspondence in its own language, and treaties between them being written in their respective languages in parallel columns. Where the States which enter into negotiation or treaty have a common language, they generally make use of it in their transactions with each other.<sup>1</sup>

§ 16. The usage of nations has established certain military and maritime ceremonials to be observed, either on the ocean between ships, or in ports between ships, and between ships and forts, or on land between armies, forts, military and naval officers, and the military honours to be paid to high civil officers. Among these is the salute by striking the flag, or the sails, or by firing a certain number of guns, &c. These are matters of, perhaps, trivial importance in themselves, but their due observance facilitates the amicable intercourse of nations, and their neglect frequently leads to international differences, dissensions and enmities, which have sometimes terminated in long and bloody wars.

§ 17. Every sovereign State has the exclusive right, in virtue of its independence and equality, to regulate the ceremonies to be observed within its own territorial jurisdiction. This extends to the ceremonials between its own ships on the high seas, and to the honours to be rendered by them to foreign ships on the high seas, and to ships and to fortresses in foreign ports. Regulations for determining these ceremonies, and the reciprocal honours to be rendered by one nation to another, are established by municipal ordinances, by usage, and by the stipulations of treaties.

§ 18. Questions of territorial jurisdiction, or dominion<sup>2</sup>

<sup>1</sup> Phillimore, *On Int. Law*, vol. ii. § 41; Wheaton, *Elem. Int. Law*, pt. ii. ch. iii. § 5; Polson, *Law of Nations*, sec. v.; Horne, *On Diplomacy*, § 50.

<sup>2</sup> Examples of certain States having prescribed rules of navigation to



over the narrow seas, have not unfrequently given rise to contentions with respect to the maritime honours to be rendered to the flag of the State claiming such dominion, by the vessels

other States, may be found in ancient history. The Romans gave directions to the Carthaginians; the Athenians prohibited the Median ships of war from entering their seas, and also dictated to the Lacedæmonians.

The dominion was claimed by Great Britain over the *British Seas*, that is, not only over the Channel, but over the four seas; the extent of this jurisdiction is mentioned in a treaty made with the Dutch in 1653, and in a subsequent treaty, five years later, the dominion is defined to be from Cape Finisterre to the middle point of the land Van Staten, in Norway. From the case of the *Queen and Sir John Constable* (H. 29 Eliz. B.R., Leonard, part 3, 72), it appears that before the Union the British dominion on the sea was claimed, not only midway to, but as far as, the coasts of France, and that it extended midway to the coast of Spain.

In the third year of Henry V. it was directed by proclamation of the King that no British subject, for one year from the date thereof, was to go to the insular ports of Denmark and Norway or to Iceland, for the purpose of fishing or for any other cause to the prejudice of those realms, *otherwise than it had been accustomed of old*.

In the reign of Edward I. one Reginer Grimbald, a French admiral, was ordered by a mixed tribunal of judges (chosen by the English and French Kings for the purpose of administering justice *secundum legem mercatoriam et formam sufferantie* to all merchants) to make satisfaction and suffer punishment because, during war between Philip, King of France, and Guy, Earl of Flanders, he had despoiled merchants of their goods on the English seas.—*Rolls Abridgment*, 528; and see Selden, *De Dom. Maris*, l. 2, c. 14, 27, 28; Coke, 4 *Inst.* 142. And the same judges, with the procurators of the Genoese, the Catalanians, the Spaniards, the Germans, the Zealanders, the Dutch, the Danes, the Norwegians, and of most of the maritime nations of Europe, jointly declared 'that the kings of England, by right of the said kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable possession of the Sovereign Lordship of the seas of England and of the isles within the same, with power of making and establishing laws, statutes, and prohibitions of arms, and of ships otherwise furnished than merchantmen use to be, and of taking surety, and affording safeguard in all cases where need shall require, and of ordering all things necessary for the maintaining of peace, right, and equity among all manner of people, as well of other dominions as their own, passing through the said seas, and the sovereign guard thereof.' It is to be observed that Edward I. did not possess Normandy, and therefore the dominion of the British seas could not have been claimed by him as *dominus utriusque ripæ*; this would be an argument in favour of the British seas being annexed to the Kingdom of England, by prescription.

Again, it is enacted, in the reign of Edward IV., that no foreigners are to fish off the coast of Ireland.

The dominion of the sea was held to confer on its possessor the sole right of fishing for pearl, coral, &c., all royal fish, and also the direction and disposal of all other fish. (Palatius, *De Dom. Mar.* lib. i. c. ii.; Sir J. Constable's case, *suprà*.)

Such as were born on the four seas of England used to be accounted British subjects, and not aliens. (Selden, *Mar. Claus.*, lib. ii. c. 24; Coke, 4 *Inst.*, fol. 142.)

of others who denied its pretensions to such supremacy. This kind of supremacy was claimed by Great Britain over the narrow seas, and by Denmark over the sound and belts at the entrance of the Baltic Sea, and serious international difficulties resulted in former times with respect to the formalities and maritime honours required by these States, and the neglect or refusal of others to observe or render them. But these peculiar formalities, formerly required by particular States, in particular places where their dominion was disputed, are now, either entirely suppressed, or modified and regulated by treaty stipulations.<sup>1</sup>

§ 19. Not only in the narrow seas, but also upon the ocean, when the ships of different nations happened to meet, serious questions sometimes arose with respect to the time and character of reciprocal salutes. Ortolan has given us numerous

<sup>1</sup> Phillimore, *On Int. Law*, vol. ii. § 34; Wheaton, *Elem. Int. Law*, pt. ii. ch. iii. § 7; Schlegel, *Staats-Recht des K. D.* Th. i. p. 412; Martens, *Nouveau Recueil*, tome viii. p. 72; Ortolan, *Dip. de la Mer*, liv. ii. ch. xv.; Chitty, *Commercial Law*, vol. ii. p. 324; Heffter, *Droit International*, §§ 32, 197; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 61; liv. ii. ch. xxix.; Gardien, *De la Diplomatie*, liv. iii. § 2.

<sup>2</sup> 'Le Ordinance de Hastings,' made in the reign of King John, decrees 'that if a lieutenant, in any voyage being ordained by Common Council of the Kingdom, do encounter upon the sea any ships or vessels, laden or unladen, that will not strike and veil their bonnets at the commandment of the lieutenant of the King, but will fight against them of the fleet, that if they can be taken, they be reported as enemies, and their ships, vessels and goods taken and forfeited as the goods of enemies, although the masters or possessors of the same would come afterwards and allege that they are the ships, vessels, and goods of those that are friends to our Lord the King, and that the common people in the same be chastised by imprisonment of their bodies for their rebellion by discretion.'

Queen Elizabeth, in 1600, stamped a *portcullis* on those dollars destined for the East Indian trade, to signify the right of closing navigation in her seas.

This 'duty of the flag,' as it was termed, although of immemorial prescription, is to be found mentioned in the treaty of peace granted to the Dutch by Great Britain in 1653. It declares (Art. 13) 'that the ships and vessels of the said United Provinces, as well men-of-war as others, be they in single ships or in fleets, meeting at sea with any of the ships of this State of England or in their service, and wearing the flag, shall strike the flag, and lower their topsail in such manner as the same hath been formerly observed in any times whatsoever.'

When the 'duty of the flag' was claimed by England, there was a clause in the naval instructions, directing the admiral and commanders under him, in case they met with any ships on the British seas which refused to render this duty to them, that they should treat them as enemies (without any declaration of war), and seize them and confiscate the goods in the ships.

The Venetians claimed similar rights over the Adriatic Sea, or Gulf



instances of these difficulties and disputes, which not unfrequently terminated in actual war. As the lowering of the flag was considered an act of humiliation, the custom was entirely dispensed with about the middle of the eighteenth century,<sup>1</sup> and salutes were confined to the firing of cannon. Nevertheless, the vessels of the Great Powers for a long time refused to salute those of the smaller States; and those of crowned heads, on entering ports and harbours of republics, required the forts of the latter (contrary to ordinary rule) to salute first. Thus the ordonnance of Louis XIV., published April 15, 1689, directed French ships of war to require salutes from foreign vessels, 'in whatever seas, or on whatever coasts they might meet.' French ships of war, carrying the flag of admiral, vice-admiral, rear-admiral, 'corvettes et flammes,' were to salute first the maritime places and principal fortresses of *kings*; the places of Corfu, Zante, and Cephalonia, belonging to the Republic of Venice, and those of Nice and Villafranca, belonging to the Duke of Savoy, were to be saluted first by vessels carrying the flag of a vice-admiral; but they were to require the other places and principal forts of all other *princes* and *republics* to salute first the admiral and vice-admiral. As early as 1667 the French fleet had required the fortress of Leghorn to salute first, but the Grand Duke of Tuscany had protested against this pretension. All

of Venice, and gave instructions accordingly, to the commanders of their ships of war. On the Isle of Corfu, the Captain of the Gulf resided, who with ships of war and galleys protected the navigation and kept it free from pirates. In particular, no vessels of the Pope, of the King of Spain, or of the Sultan of Turkey, could enter the Gulf without the licence of the State. In 1638, a Turkish fleet was attacked by the Venetians, and many of their ships were sunk for a disregard of this requirement. (See Baptist Nani, *Hist. of Venice*, lib. ii., fol. 446 *et seq.*) So jealous were the Venetians of permitting ships of any other State to navigate the Gulf, which they deemed part of their domain, that in 1630 they refused to permit the Queen Mary, sister of the King of Spain, and married to the King of Hungary, to sail from Naples to Trieste in vessels of the Spanish Navy, but required her to embark in Venetian galleys, declaring that, if she proceeded in any other way, the Republic would by force assert their proper rights to attack the Spanish Navy as if they were enemies, and in a hostile manner invade them. The Queen was subsequently carried in the Venetian vessels with great courtesy and ceremony. (Palatius, *De Dom. Mar.* ii., c. 6, also Paucius, *De Dom. Mar. Adriat.*)

<sup>1</sup> On November 4, 1829, a warrant of arrest was issued against the master of the *British* merchant schooner 'Native' for contempt in passing H.M.S. 'Semiramis,' in Cork Harbour, without striking or lowering her royal, being the uppermost sail she was then carrying. R. v. Benson, 3 *Hagg.*, 96 n.



French vessels carrying flags inferior to those of admiral and vice-admiral were to salute first maritime places and principal fortresses. Where the first salute was given by an admiral or vice-admiral, it was to be returned gun for gun; where given by a vessel of lower grade, it was to be returned by a less number of guns, according to the rank of the commander. A return salute by a vice-admiral was to be given gun for gun. Other sovereigns made pretensions equally absurd against the smaller powers. The King of Spain, Philip II., forbid all Spanish vessels carrying the arms of Spain to lower their flag to foreign vessels, or to first salute the cities and fortresses of other sovereigns. But all these pretensions were finally abandoned in the course of the eighteenth century, and vessels of different States saluted each other without any reference to the relative character or power of their several governments, the salutes being, by general consent, divested of all idea of domination or supremacy.<sup>1</sup>

<sup>1</sup> Cleirac, *Us et Coutumes de la Mer*, p. 513; Bouchard, *Théorie des Traités de Commerce*, p. 427.

By Article 11 of the Protocol of December 30, 1814, made at Vienna by the eight members of the Commission representing Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden, it was concluded that:—‘Le salut dans les Ports et en haute mer est réglé pour les vaisseaux et escadres des puissances mentionnées en l’article 5 d’après le principe énoncé à l’article 10.—Les règlements nécessaires à l’application de ce principe seront déterminés sur le pied de la plus parfaite réciprocité.—Les vaisseaux des autres états accordent les premiers le salut à ceux des puissances mentionnées ci-dessus.’

The Plenipotentiary for Great Britain said, ‘qu’il n’exprimait point une opinion contraire au principe énoncé dans cet article, mais qu’il ne se trouvait pas muni des informations qui lui ont paru nécessaires relativement aux usages établis, ni des instructions de sa cour au sujet des règlements militaires, à cet égard il demandait qu’on insérât sa réserve sur cet article au protocole.’ This was accordingly done.

The Powers mentioned in the said Article 5 are those of the Pope, Netherlands, United States of America, and Swiss Confederation. The said Article 10 declares that ‘lorsqu’un traité ou autre acte officiel comprendra plusieurs des puissances mentionnées à l’article 5 dans l’original, qui devra rester à chacune d’elles, le nom de cette puissance sera placé le premier et celui des autres souverains le sera dans l’ordre de leur événement à la couronne, et pour les Républiques d’après la date de l’élection de leur premier magistrat.’

On February 7, 1815, it was reported to Lord Bathurst, by the Admiralty of Great Britain, that in their opinion difficulty would arise on the above subject. England had always claimed the sovereign dominion of the British seas, comprehended between the meridian of Cape Finisterre and the latitude of Van Staten in Norway, and within those limits had always enforced acknowledgment from other ships in their striking their flag and topsail. In later times the ‘homage’ was not

§ 20. Of the treaties entered into between different States, respecting salutes, we will refer to the following. By article nineteen of the treaty of August 30, 1721, between Russia and Sweden, it was stipulated that there should be a reciprocity in the number of guns to be fired by vessels passing Russian and Swedish fortresses. By the treaty of January 11, 1787, between France and Russia, it was stipulated that, in order to avoid all the difficulties to which the flags and different grades of officers might give rise, there should be no salutes between the vessels of the two nations, either on the high seas or in port. By article ten of the treaty of January 17, 1787, between Russia and the Two Sicilies, it was stipulated that there should be a perfect equality between the two powers, with respect to maritime salutes. Two vessels insisted on, nor paid for many years, but Great Britain had not formally renounced it. They were unwilling to advise that it should be formally renounced.

It was then the practice (and no inconvenience was felt from it), to abstain from salutes on the high seas, and for the stranger ship to salute first the flag of the country in whose port she arrived.

See further on this subject British Naval Instructions, 1806, Salutes 10, 15, 16, 23, 24.

By a Declaration signed at Madrid, March 2, 1865, by and between the British and Spanish Governments, it was agreed to abolish the regulations by virtue of which it was required that merchant vessels which cruised in the Straits of Gibraltar, should show their flag in passing within cannon shot of the places of war and fortresses belonging to those Powers respectively, and commanding the said Straits; and it was equally agreed to abolish the intimation by means of shots—first with powder only, and afterwards with ball, to those vessels which might neglect or refuse to show their flag. This agreement does not apply to time of war.

It has been decided by the several maritime powers that from July 1, 1877—

The following salutes only will be returned gun for gun:—1. The salute to a national flag on arrival in a foreign port. 2. To foreign flag-officers or commodores, when met with at sea or in port.

The following salutes will no longer be returned:—1. To royal personages, chiefs of states, or members of royal families, whether on arrival at or departure from a port, or upon visiting a vessel of war. 2. To diplomatic, naval, military, or consular officers, or to governors or officers administering a government. 3. To foreigners of distinction on visiting a vessel of war. 4. Upon occasions of national festivals or on anniversaries.

By British Admiralty Circular, 1876, when foreign ships of war salute the British flag, or British royal or other personages, or any British functionaries under similar circumstances, the same rules are to be reciprocally observed by British ships present, as to returning or not returning the salutes; salutes to the Lord-Lieutenant of Ireland and to the Viceroy of India are not to be returned; when the flag of the Lord High Admiral or the Lords Commissioners of the Admiralty is saluted by a foreign ship of war on her arrival or on meeting, such salute will be returned gun for gun; the foregoing rules will also, as far as applicable, be observed in India.



meeting upon the high seas, that commanded by an officer of the lower rank was to salute first, the salute to be returned gun for gun; if the commanders should be of equal rank, no salute was to be given by either party. In entering a port where there was a garrison, the usual salute was to be given, and returned gun for gun; 'excepting, however, the residence of the respective sovereigns, where, according to general usage, this salute is not given by either party.' By the treaty of November 11, 1730, between Russia and Denmark, concluded for an unlimited time, it was stipulated that Danish vessels should salute first in the North Sea and the White Sea, and that Russian vessels should salute first in the Catagat, and on the coasts of Norway. By the treaty of 1809, between Russia and Sweden, it was stipulated that salutes upon the sea should be according to the rank of the respective officers, the lowest saluting first, and the other returning gun for gun; that vessels entering ports, or passing castles or forts, should salute first, the return salute being gun for gun. The same stipulations had been made in the treaty of 1798, between Russia and Portugal. By the treaty of 1827, between Great Britain and Brazil, it was stipulated that the salute should 'conform to the rules observed between the maritime powers.' By the treaty of 1829, between Russia and Denmark, it was stipulated that vessels of war should continue to salute ports or batteries, the salute to be returned gun for gun; but that they were not to salute other vessels of rank inferior to an admiral, and that the return salute by an admiral was to be *less two guns*, and by a grand admiral *less four guns*.

In addition to these treaties with respect to salutes, there has been a gradual tendency among maritime States to adopt a uniform system, by assimilating their internal laws and ordinances by which their salutes are regulated. Moreover, publicists have sought to deduce from reason certain general principles which should form the basis of all internal regulations, and thus remove all cause of difficulty or dispute.<sup>1</sup>

A foreign ship of war bearing a flag officer, or commodore superior in rank to the officer in command of a British ship of war, is saluted by the latter, and *vice versa*.

<sup>1</sup> D'Hauterive and De Cussy, *Recueil de Traités*, tome ii. pt. ii. p. 70; Klüber, *Droit des Gens*, § 117; Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. ch. xi.



§ 21. The following general rules are collected from the best authorities on international jurisprudence :—

As already stated, the method of saluting by striking or furling the flag is now entirely abandoned between ships of war, although merchant vessels, as a mark of deference, sometimes salute in this way the men-of-war of their own State. But Ortolan considers even this as an objectionable practice, because the national flag should be considered as a sacred emblem, and should never be lowered voluntarily, not even through deference and as a matter of politeness. A salute by lowering the sails is more suitable and much less objectionable ; it is sometimes used by merchant vessels. Merchant vessels of different nations, meeting on the high seas, or in port, do not, as a general rule, salute each other ; sometimes, however, they exchange compliments by lowering their national flags. This, for the reason given above, is by some regarded as an objectionable practice. Such salutations should be confined to private signals, or to the sails.

All sovereign States are, with respect to salutes, to be regarded as equal ; and any inequality of salutes, in respect to time, place, form, or number of guns, is to be regarded as resulting from general agreement, or of individual rank of the parties saluting, and not as conveying any idea of domination or supremacy. Salutes are never, in the absence of treaty stipulations, to be regarded as obligatory, but as a matter of courtesy and etiquette. To refuse an exchange of salutes is therefore regarded as evidence of a want of friendship and goodwill, which justifies the other party in asking explanations ; but it cannot in itself be considered an offence or an insult, sufficient to justify hostilities.

Where two ships of war meet upon the high seas, courtesy requires that the commanding officer lowest in rank shall salute first, and that the salute be returned, gun for gun. The same rule holds with respect to the flag-ships of squadrons ; but a single ship, no matter what its rank, meeting a squadron, salutes first. Vessels carrying sovereigns, members of royal families, rulers of States, and ambassadors, are to be saluted first. As before remarked, only personal salutes can be returned by a less number of guns.<sup>1</sup>

<sup>1</sup> But see note to § 19 ; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 62 ; Heffter, *Droit International*, § 197 ; Martens, *Guide Diplomatique*, § 68 ; Martens, *Völkerrecht*, § 155 ; Nau, *Völkerseerecht*, § 139 et seq.

§ 22. Vessels of war, in entering or leaving foreign ports, or in passing foreign forts, batteries or garrisons, salute first, without reference to the relative rank of the officers of the ships and forts. Such salutes are always to be returned gun for gun. As messages are to be exchanged between the parties, with respect to the number of guns to be given and returned, such salutes are usually fired after the vessel comes to anchor, and before leaving her anchorage on her departure. This salute is a compliment to the flag, and, consequently, is considered international rather than personal. The same rule holds with respect to the interchange of compliments and visits with the authorities on shore; the compliment or visit being first made from the vessel, without regard to relative rank, even if it were possible to fix any relative rank for officers so different in their nature and character. The rule, making such compliments international, avoids any necessity of attempting such assimilation.

An apparent exception is made to this rule in the case of vessels carrying persons of sovereign rank, members of the royal family, or ambassadors representing sovereigns or sovereign States. In such cases, the forts, batteries and garrisons, always salute first. But such salutes are intended expressly for the persons carried, and not for the vessel carrying them, and, consequently, the vessel does not return the salute. It is customary, however, for such vessel, if foreign, to afterward salute the fort or garrison in the usual manner, which salute is, of course, to be returned gun for gun. Ambassadors visiting foreign ports, not the capital or seat of the Court of a sovereign or a sovereign State, first receive the visits and compliments of the local authorities. This rule of courtesy results from their supposed representative character. The rules of etiquette to be observed with respect to ambassadors at foreign Courts have already been discussed in another chapter. Where vessels of war, in foreign ports, land or receive on board their own sovereigns, or officers of their own government, the salutes to be given and ceremonies to be observed, are to be determined by their own laws and regulations. The same remark applies to the compliments to be paid on such occasions by other ships in port, and by the military establishments on shore, each being governed by their own laws and regulations. Every country



determines for itself the salutes to be paid to its own authorities, and it will hardly be expected that any higher compliment will be paid to those of other countries, of the same rank. All such matters, however, should be regulated by previous arrangement, and in cases of differences which cannot be accommodated, the party dissenting will take no part in the ceremonies.<sup>1</sup>

§ 23. Ships of war of different countries, meeting in port, exchange salutes, gun for gun, the officers of the lowest rank always saluting first, except in the case where a single ship meets a squadron or fleet, in which event the flag ship is first saluted, without regard to the relative rank of the officers. In all other cases, where the officers are of equal grade, the last arrival salutes first. Salutes are not to be exchanged where the regulations of the place do not permit them. With respect to the ceremony of visit, courtesy requires that the commander of the vessel in port shall first send a message of compliment and inquiry to the commander of a vessel coming into port, and such message of compliment is to be immediately returned by the new comer; after which the visits of ceremony are to be exchanged, the lowest in rank visiting first.<sup>2</sup> The number of guns to be fired in a salute is usually determined by the laws and regulations governing the party which salutes first, but before making the salute, it is proper to ascertain whether it will be returned gun for gun.

Vessels of war in foreign ports celebrate their own fêtes according to the regulation of their own government. Courtesy also requires them to take part in the national fêtes of

<sup>1</sup> Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. ch. xi.; Moser, *Kleine Schriften*, B. ix. p. 297; Martens, *Völkerrecht*, § 155.

<sup>2</sup> The maritime powers generally concur that the following procedure shall for the future be observed in all ports, whether home or foreign, by the commanding officers of ships and vessels of war:—

The flag or other officer in command of one or more ships of war in port, whatever may be his rank, will, upon the arrival of any ship or ships of war of another nationality, send an officer to such arriving ship, or in case of a fleet or squadron, to the ship of the officer in chief command of it, to offer the customary courtesies. The captain of the ship to which this visit is paid will send an officer to return it.

Within twenty-four hours of arrival the flag or other officer in chief command of the arriving ship or ships will visit the officer in chief command of the fleet or squadron or single ship of war (as the case may be) of another nationality, present at the port, if he be his equal in grade, and the visit will be returned within twenty-four hours of being paid. In



the place, by joining in the public demonstrations of joy or grief. The same mark of respect is shown to vessels of a third power which celebrates fêtes in foreign ports. But if such celebrations are of a character to offend or wound the feelings of their own countrymen, or the nation in whose waters they are anchored—as public rejoicings for a victory gained—ships of war will remain as silent spectators, or leave the ports, according to the circumstances of the case. In public ceremonies upon land, the commandants of vessels or fleets usually land with the officers of their staff, and receive a place of honour, according to the hierarchy of rank, precedence being determined by grade, and, if equal, by date of arrival. In case of disputes as to rank, it is proper for the contestants to withdraw and become mere spectators of the ceremonies.

In dressing or decorating ships on occasions of public fêtes, embarrassments sometimes occur in arranging the flags of different nations. A French ministerial order of April 26, 1827, directs that, in decorating a ship in the ports of France, 'the national flags of foreign vessels of war in the same ports shall be placed in the front line, and in the following order: the national flag of the foreign commanding officer of the highest grade or, if equal in grade, the flag of the one which arrived first, and successively the flags of other foreign vessels according to the grade of the commanders, or according to the dates of their arrivals where the grades are equal. If the vessels decorated are in a foreign port, the first place of honour is given to the flag of the nation within whose maritime jurisdiction they are anchored; next, to the flags of

the case of officers of different grades, the inferior will, in such cases, pay the first visit, the same limits of time being observed as to the visit and its return.

The grades are :—admiral, vice-admiral, rear-admiral, commodore, captain, commander, lieutenant or other commanding officer.

All flag officers, including commodores, will return the visits of captains and those of grades superior to captains. They will send their flag captains or commanders to return the visits of commanders, lieutenants, and other officers in command. Captains and officers of a lower grade will return the call of commanders and officers of inferior rank in command.

In the case of a fleet or squadron arriving or being in port, and after the interchange of visits between the senior officers shall have taken place, the captains or other officers in command of the several ships of war arriving will call upon the captains or other officers in command of the ships of war in port, who will return the visits.

foreign vessels of war in the same port, according to the order above indicated, and next, to the flags of foreign nations whose consuls residing there hoist their colours on fête days.<sup>1</sup> But a subsequent ministerial order directed French vessels to decorate only with French flags and signals. As signal flags frequently resemble the flags of other nations, care should be taken, even in that mode of decoration, not to give offence by the order of their arrangement.

§ 24. The regulations of the British navy are very minute with respect to salutes and honours to be rendered by British ships to British men-of-war, and, also, by one man-of-war to another, or to a squadron or fleet. The commanders of British merchant ships have been punished by the Courts for neglecting or refusing to render the honours due, and for assuming to wear the flags, pendants, etc., to which only ships of the royal navy are entitled.

With respect to saluting the flags of other powers, at sea or in port, the orders direct that 'all salutes from ships of war, of other nations, either to Her Majesty's forts, or ships, are to be returned, gun for gun. A British ship or vessel of war meeting at sea a foreign ship-of-war, bearing the flag of a flag-officer, or the broad pendant of a commodore commanding a station squadron, and superior in rank to the officer of the British ship or vessel, shall salute such foreign flag-officer or commodore with the number of guns to which a British officer of corresponding rank is entitled, on being assured of receiving in return gun for gun; and in the event of a British ship meeting with such foreign flag-officer, or commodore, in a foreign port, similar complimentary salutes with such foreign flag-ship should be observed, if the regulations of the place shall admit thereof.<sup>1</sup>

§ 25. French naval regulations, established by the decree of August 15, 1851, are also very minute on all matters of ceremony, and seem admirably adapted to their purpose. Article seven hundred and thirty-nine prescribes the mode of celebrating national fêtes, whether French or of foreign nations, in foreign ports, and directs that, 'in all cases, the superior commander shall conform, as far as possible, in these ceremonies, to the usages of the place.' Article seven

<sup>1</sup> Queen's Regulations; Phillimore, *On Int. Law*, vol. ii. §§ 36, 37; Prendergast, *Law relating to the Officers of the Navy*, pt. ii. p. 449.



hundred and forty-one provides that, on the high seas, or in foreign ports, the officer commanding one or more vessels of war will salute the distinctive mark of the commanders-in-chief of foreign vessels, conforming the salute to the usages of the military marine of such foreign vessels, first being assured of a reciprocity. Article seven hundred and forty-two directs that, in entering a foreign port, the vessel will first salute the place, and afterward the ships of war at anchor, first ascertaining that the salutes will be returned gun for gun. Article seven hundred and forty-three directs, that salutes of foreign ships of war shall be returned, gun for gun, whatever may be the rank of the officers commanding, provided the salute does not exceed twenty-one guns. The salutes of foreign merchant vessels are to be returned by French ships of war, less two guns. Article seven hundred and forty-four says: 'Personal salutes are not given; nevertheless, in this respect, the usages and precedents of the country where the vessel is may be followed.' Article seven hundred and forty-five prescribes the disposition to be made, in a foreign port, of the French flag, and that of the foreign power, while saluting and celebrating national fêtes. Article seven hundred and fifty-one prescribes in detail the ceremonies to be observed in exchanging visits of compliment with foreign vessels, and with the authorities on shore. A French vessel being in port will always send an officer with his compliments to the commander of a foreign vessel coming into the same port; if the foreign officer so arriving is of inferior rank, the French commander will wait to be visited, but, if the new comer be of superior rank, the other will make the first visit of ceremony, after receiving a message of thanks for that of compliments previously sent.<sup>1</sup>

§ 26. Spanish legislation, with respect to maritime ceremonial, conforms in principle to the rules adopted by other maritime powers. In regard to salutes from Spanish ports to foreign vessels, by royal orders of August 15, 1741, of July 2, 1770, of December 5, 1776, and of March 30, 1838, it is provided, that, without changing the established usage of each port, foreign vessels of war which salute first are to be saluted in return, gun for gun. With respect to

<sup>1</sup> Ortolan, *Diplomatie de la Mer*, tome i. p. 382, note, third edition; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 62.



Spanish vessels entering foreign ports, the *ordenanzas* of 1793 direct that the chiefs of vessels or squadrons shall, before entering, inform themselves of the practice observed there, and that they will salute on ascertaining that it will be returned, gun for gun; and that, if no custom has been established, they will enter into an agreement for such exchange of salutes, both in going into and coming out of foreign ports. By the same *ordenanzas* and royal order of February 7, 1799, it is directed that Spanish vessels, meeting other vessels on the high seas, or in foreign ports, are not to salute, nor to require a salute; but, if they should be saluted, they are to return it, gun for gun. Foreign vessels of war in Spanish ports are to salute only those of their own nation. By royal orders of January, 1826, and September 7, 1828, it is directed that Spanish ports in which there are foreign vessels, shall, on the birth days of such foreign sovereigns, make the same salutes and demonstrations as are made on the birth day of Spanish sovereigns, provided that such foreign vessels extend the same courtesies on such Spanish festival occasions.<sup>1</sup>

§ 27. The military regulations for the government of the army of the United States determine, with great minuteness, the salutes and military honours to be paid by troops and forts to our civil, military, and naval officers, according to the rank of each. Thus, a national salute is determined by the number of States composing the Union, at the rate of one gun for each State. The President of the United States alone, is to receive a salute of twenty-one guns; the Vice-President, seventeen guns; the heads of the executive departments of the federal government, the commanding general of the army, and the governors of States and territories, within their respective jurisdictions, fifteen guns; major-generals, and ministers to foreign States, thirteen guns; brigadier-generals, eleven guns; and officers of the navy, according to their relative rank with officers of the army. The President and Vice-President of the United States are to be received by troops with standards and colours drooping, officers saluting, drums beating, and trumpets sounding. The compliments of other officers of government are varied according to the rank of

<sup>1</sup> Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. ch. xi.; *Ordenanzas de la Armada*, passim.

each. Foreign officers, whether civil, military, or naval, when invited to visit a military post or national vessel, are to be saluted according to their rank, and to receive the same honours as officers of the United States, of the rank which corresponds. Thus, a foreign sovereign prince receives the same honours as the President of the United States; foreign ambassadors and ministers, the same as American envoys of corresponding rank to foreign Courts, etc. Foreign ships of war, entering American ports, are saluted from fortifications in return for a similar compliment, gun for gun on notice being officially received of such intended salute. It is usual to agree beforehand what number of guns are to be fired, and it is directed that in no case shall the compliment exceed the national salute. Similar rules are established for the navy of the United States with respect to salutes to be given to their own and foreign officers. American ships of war, on visiting foreign ports, salute fortifications on receiving notice that the compliment will be returned gun for gun. Their ships salute each other and foreign ships, according to the rank of their respective commanders.<sup>1</sup>

<sup>1</sup> *U. S. Army Regulations; U. S. Navy Regulations.*

By chapter iv. of Regulations for the Navy of the U.S., 1876, it is ordered that a foreign sovereign, or the chief magistrate of any foreign republic, when visiting a vessel of the navy, shall be received with the honours prescribed for the President, except that the flag of his country shall be displayed at the main, and the band shall play his national air.

Members of a royal family, when visiting a vessel of the navy, shall receive the same honours as would be paid to their sovereign, except that one salute only shall be fired on leaving.

In addition to the foregoing, yards may be manned for the President of the United States, a foreign sovereign or chief magistrate, and for members of a royal family.

By chap. iv. sect. ii. of the same regulations, whenever a minister appointed to represent the United States abroad, or a minister of a foreign country, shall visit a vessel of the navy, he shall be received by the admiral, commodore, or commanding officer, and the marine guard shall be paraded. A salute of fifteen guns shall be fired on his leaving.

A chargé d'affaires, or commissioner, shall be received in the same manner, but the salute shall be eleven guns.

A consul general shall be received by the commanding officer, and saluted with nine guns.

A consul shall be received by the commanding officer, and saluted with seven guns.

A vice-consul or a commercial agent shall be received by the commanding officer, and saluted with five guns.

It is illegal, by the ancient usage of England, for any private ship to make use of the ensign or other flags of the Royal Navy. On the union with Ireland, 1801, a certain ensign was appointed to be used by all merchantmen in the United Kingdom, and no ensign or flag of the Royal



§ 28. These rules, however just and proper in themselves, sometimes give rise to serious questions in their application to particular cases. Thus, should a *commodore*, or *flag-officer*, who is the highest officer in the United States' navy, receive the same honours as a British or French *admiral*, who has the same command, or only such as are due to a British or French *commodore*, who, although enjoying the same title, has an inferior command, and is, in fact, of inferior rank? Again, is a *general* of the highest rank in the United States' army to receive the same honours as a British or French *marshal*, or only those of an inferior officer, who has the same title of general? Again, if a foreign sovereign prince should visit an American ship of war in one of his own ports, should he receive only the honours which such ship pays to the President of the United States, or the honours, perhaps much higher, which would be due to him from one of his own ships? Such questions, although relating to mere matters of etiquette and ceremony, are sometimes of considerable importance, as

Navy was to be employed by them without special permission. See 'The Minerva,' 3 *Rob.* 34; *R. v. Miller*, 1 *Hagg. R.* 197; and *R. v. Benson*, 3 *Ibid.* 96, which reports that in 1833 a master of a British merchantman was condemned in the penalty of 50*l.* and costs for wearing a red pendant at the main peak. The pendant was seized by an officer from a British man-of-war, who came on board for that purpose.

It is enacted by 17 and 18 Vict. c. 104, s. 105, that 'if any colours usually worn by Her Majesty's ships, or any colours resembling those of Her Majesty, or any distinctive national colours, except the red ensign usually worn by merchant ships, or except the union jack with a white border, or if the pendant usually carried by Her Majesty's ships, or any pendant in any wise resembling such pendant, are, or is, hoisted on board any ship or boat belonging to any subject of Her Majesty without warrant for so doing from Her Majesty, or from the Admiralty, the master of such ship or boat, or the owner thereof if on board the same, and every other person hoisting, or joining, or assisting in hoisting the same, shall for every such offence incur a penalty not exceeding 50*l.*, and it shall be lawful for any officer on full pay in the military or naval service of Her Majesty, or any British officer of the Customs, or any British Consular officer to board any such ship or boat and to take away any such jack colours or pendant, and such jack colours or pendant shall be forfeited to Her Majesty.'

Sir H. Jenner said (*Evidence before Select Committee of House of Commons on Admiralty Courts*, p. 35) that the offence of wearing illegal colours was within the jurisdiction of the Court of Admiralty, but that in case of a fair ground of excuse or palliation the penalty was not sued for. But it is questionable whether the penalty, if sued for under the above statute, should not be enforced by the Attorney General, and in the Courts of Common Law.

It may be here mentioned, that the common supposition that the national colour of Ireland is green, is a mistake. Ever since the introduction of the English rule in that country, the field of the national arms, (and therefore the national colour), has been blue; before that time, it does not appear that there was any general national colour.



promoting or disturbing relations of friendship. Where not arranged by some international agreement, they should be settled in each case by a mutual understanding, entered into beforehand, between the immediate parties who give and receive the salutes; and where no such agreement can be made, it is proper to abstain from all salutes, visits, and ceremonies.

A dispute of this kind, with respect to relative rank, occurred in the anchorage of Sacrafios, Mexico, between Vice-Admiral Baudin, commanding the French ship 'La Néréide,' and Commodore Shubrick, commanding the American sloop 'Macedonian.' A similar difficulty, with respect to salutes, occurred at Toulon, in 1830, between Vice-Admiral de Rigny, commanding the French ship 'Le Conquérant,' and the captain of an English frigate.<sup>1</sup>

§ 29. It is hardly probable that different nations will ever assign the same names or grades to the officers of the same command, either upon land or in their respective naval forces. Difficult and embarrassing questions of rank and precedence will, therefore, necessarily arise, whenever they meet upon the high seas or in foreign ports. In the matter of salutes it would be easy to avoid any question of this kind, by considering all salutes as international, instead of personal, to the officer, according to his rank, such salutes being always returned gun for gun, as is now the practice between ships and forts. If the salute were considered as given to the *flag* borne by the ship instead of the *officer* commanding it, the salutes would necessarily be equal, and always the same, as the flag represents the State to which it belongs, and all sovereign and independent States are now considered, in international law, of equal dignity, in matters of ceremony. A similar rule might be applied to military salutes given to foreign officers on land, each officer entitled to a salute being considered as representing the dignity of his State, whatever might be the name or rank conferred upon him by such State. The question of time as to which should salute first, would then be governed by the rules already established with respect to vessels of equal rank.<sup>2</sup>

<sup>1</sup> Blanchard et Dauzats, *Relation de l'Expédition F. au Mexique*, pp. 583-585; *Reports of the Sec. of the Navy, Cong. Doc.* 1841, etc.

<sup>2</sup> Klüber, *Droit des Gens*, § 121; Nau, *Völkerseerecht*, § 143; Heffter, *Droit International*, § 197; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. xv.; *Décret du 15 Août*, 1851, art. 749. See *suprà*, §§ 19, 23.

## CHAPTER VI.

## RIGHTS OF PROPERTY AND OF DOMAIN.

1. Divisions of the sovereign powers of the State—2. Prerogatives of the sovereign—3. *Jura majestatis* and regalia—4. Property and domain of State—5. Right of eminent domain—6. Right of a State to own property—7. Modes of acquiring property—8. Right of disposition of territory—9. Inhabitants of transferred territory—10. Examples of alienation by sale—11. By mortgage—12. By deeds of gift and bequest—13. Extent of maritime territory—14. Extent of the terms 'coasts' and 'shores'—15. Ownership of islands—16. Principle of the king's chambers—17. Difficulties in its application—18. Claims to contiguous portions of the sea—19. Danish sound dues—20. Questions of *mare clausum*, and *mare liberum*—21. Black Sea, how far a *mare clausum*—22. The great lakes and their outlets—23. Navigable rivers within or bounding on a State—24. Changes in rivers or lakes dividing States—25. Effect of such changes on boundaries—26. Navigable rivers passing through several States—27. Incidental use of their banks—28. Right of innocent passage—29. This right may be modified by compact—30. Navigation of the Rhine—31. Of other European rivers—32. Navigation of the Mississippi—33. Of the St. Lawrence.

§ 1. BEFORE proceeding to discuss the rights of property and domain, it may be proper to define what is understood by the property and domain of a State, as distinguished from the rights of sovereignty, and the powers and prerogatives of the sovereign or ruler.

As remarked in a preceding chapter, the *sovereignty* of a State is the collection of the wills and powers of all the individual members of which the State is composed. According to Grotius, Puffendorf, and more modern text-writers, this power has two subjects,—*common* and *proper*,—the former being the State itself or the community which constitutes the State, and the latter the person or persons in whom, by the organic laws, the power is vested; the former, being the source, is one and indivisible, while the latter may be one or many, and is frequently divided into *legislative*, *executive*, and *judicial*, each branch or division being separate and distinct, and sometimes entirely independent. The *sovereignty* of a State, is, therefore, its public power or authority, and the *sovereign* is the person, or body of persons, who are invested



with that power or authority. If that power or authority remains in the community, the *common* and *proper* subjects are one and the same, and the government is a *democracy*; if vested in a number of individuals, it is an *aristocracy*; if in a single person, it is a *monarchy*. These simple forms are modified and varied, according to the organic laws of each State.<sup>1</sup>

§ 2. The term *prerogative* is frequently used to express the uncontrolled will of the sovereign power in the State. It is applied not only to the king, but also to the legislative and judicial branches of a government, as the 'royal prerogatives,' the 'prerogatives of parliament,' the 'prerogatives of the Court,' &c. Rutherford says, prerogative simply means a power or will which is discretionary, and above and uncontrolled by any other will, and that, if this power be limited in any respect, so far the prerogative is at an end. In speaking of the royal prerogative, Blackstone says: 'It signifies, in its etymology (from *prae* and *rogo*), something that is required or demanded before or in preference to all others. And hence it follows that it must be in its nature singular or eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, and in contradistinction to all others, and not to those which he enjoys in common with his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And, therefore, Finch lays down as a maxim, that the prerogative is that law, in case of the king, which is law in no case of the subject.'<sup>2</sup>

<sup>1</sup> Grotius, *de Jur. Bel. ac Pac.*, lib. i. cap. iii. §§ 6, 7, 17; Puffendorf, *de Jur. Nat. et Gent.*, lib. vii. cap. ii. § 20; cap. iv. § 1; cap. v. § 1; Bowyer, *Universal Pub. Law*, pp. 210-216; Vattel, *Droit des Gens*, liv. i. ch. i. §§ 1, 3; Gardin, *De la Diplomatie*, tome i. pp. 106, 110; Martens, *Précis du Droit des Gens*, § 23; Rayneval, *Institutions du Droit*, tome i. p. 44; Ortolan, *Diplomatie de la Mer*, tome i. pp. 11, 12; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 5; Ortolan, *Domaine International*, pp. 16 et seq.; Heffter, *Droit International*, §§ 16-25; Burlamaqui, *Droit de la Nat. et des Gens*, tome iv. pt. ii. ch. v.; Merlin, *Répertoire*, verb. 'souveraineté'; Proudhon et Dumay, *Domaine Public*, tome i. ch. vii.

<sup>2</sup> Finch further says (L. 84, 85): 'The King has a prerogative in all things that are not injurious to the subject; for in them all it must be remembered that the King's prerogative stretcheth not to the doing of any wrong.'

Bracton says (L. iii. t. i. c. ix.): 'Nihil enim aliud potest rex, nisi id solum quod de jure potest.'

One of the prerogatives of the King is sovereignty, and, therefore, no suit can be brought against him; yet in England, any person, who has a just demand in point of property against the King, may ask it



But this word, which properly signifies power or will, is sometimes applied by law writers to the *thing* over which that power or will is exercised. Thus, the king's revenue is sometimes called the king's *fiscal prerogatives*; moreover, the sources of that revenue are, by an elliptical expression, sometimes called prerogatives. Thus, the rents and profits of the demesne lands of the crown, and even the lands themselves, have been classed as prerogatives of the crown. So of forfeited lands, mines of gold and silver, treasure-trove, waifs, estrays, &c. But these are *things* and not *powers*; they may belong to the king *by virtue* of his prerogatives, and be held by him as the property of the crown *by virtue* of his sovereignty, as well as by any other right of property, but they are themselves neither prerogatives nor sovereignties. It is necessary to bear in mind the distinction between the right of property, or property itself, and the origin or source of that right.<sup>1</sup>

by means of a 'petition of right' in the Court of Chancery, as a matter of favour, not of right.

It is an important axiom that the 'King can do no wrong,' for if he could, there would be no means of redress. But his Ministers and Counsellors who have wrongly advised him, or assisted him in derogation of the law of the land, are punishable by indictment and impeachment. However, unconstitutional tyranny or oppression invariably furnish their own remedy, as was proved in the case of James II. Moreover, both Houses of Parliament have a right to remonstrate with the King, even concerning those acts which are personally his own. This right belongs to no individual member, but to the whole House collectively; and members have been sent to the Tower of London for want of respect in this regard. See *Com. Journ.*, November 18, 1685; *ibid.*, December 4, 1717.

In the middle ages, there was frequently more than one law governing the population of a State. The Church had its own law, the State another, merchants their own customs, &c. The idea prevailed that the King was above all law, or had a law of his own. Thus Fleta, book ii. chap. ii., paraphrased by Bacon in his argument for the Post-Nati, records, 'If a King of England travel or pass through foreign territories, yet the allegiance of his subjects followeth him—as appeareth in that notable case which is reported in Fleta, where one of the train of Edward I., as he passed through France from the Holy Land, embezzled some silver plate at Paris, and jurisdiction was demanded of this crime by the French King's counsel-at-law *ratione soli*, and demanded likewise by the officers of King Edward *ratione personæ*; and after much solemnity, contestation and interpleading it was ruled and determined for King Edward, and the party tried and judged before the Knight-Marshal of the King's house, and hanged after the English law, and execution in St. Germain's meadows.' 'Tandem consideratum fuit quod rex Angliæ illâ regni prerogativâ et hospitii sui privilegio uteretur et gauderet.' This prerogative was, doubtless, the origin of the doctrine of the extritoriality of ambassadors and of ships of war. See *post*, cc. vii. and x.

<sup>1</sup> Rutherforth, *Institutes*, b. ii. ch. iii. § 10; Blackstone, *Commentaries*, vol. i. pp. 239 et seq.

§ 3. The word *majestas* was used by the Romans to express the supreme dignity of the commonwealth, and hence *majestas*, as employed by the civilians, is a legal term signifying *the sovereign dignity of the State*; and the different powers of the State, or parts of sovereign power, are called by them *jura majestatis*. They very properly distinguish between things, and rights to things, the former being called *corpora*, and the latter *jura*. 'Upon the breaking up of the Roman empire,' says Gamboa, 'the princes and cities, which declared themselves independent, appropriated to themselves those parts in which nature, most rich and liberal, yields extraordinary products. These portions, or reserved rights, were called *regalias*.' The same writer, in other places, applies the term *regalia* both to rights to things, and to the things themselves,—to *jura* and *corpora*. So of the feudal and English law writers. They sometimes apply this term to things, as the crown, and sceptre, and royal and church lands, and sometimes to the dignity, power and pecuniary rights of the king. When applied to the power and dignity of the king, they are called *majora regalia*, and when applied to his fiscal rights, they are called *minora regalia*. The former, says Erskine, are not alienable without the consent of parliament, while the latter may be communicated to his subjects by the sovereign himself, at his pleasure. The term *regalia*, therefore, differs from sovereignty, or *jura majestatis*, as being applicable both to things and to rights to things—*corpora* and *jura*—and, also, as not being inherent to or inseparable from the sovereign power, for *regalia* may be alienated, either with or without the consent of parliament. It may be applied to the rights and prerogatives, not only of the king, but also of the church, the treasury, the courts, and parliament, and also to property of the State, of the church, &c. And when applied to property, it may include both that which necessarily appertains to the crown, and that which is alienable, or which may be passed to individual subjects.<sup>1</sup>

<sup>1</sup> Gamboa, *Commentarios*, cap. ii. §§ 4, 16, 21, 24; Dou, *Derecho Publico General*, lib. i. tit. ix. cap. v.; Erskine, *Institutes*, pp. 323 et seq.; Merlin, *Rép. de Jurisprudence*, verb. 'droits régaliens.'

Vattel says, *Droit des Gens*, lib. i. ch. x. § 108, that it is an encroachment on the prerogative of a State for another State to counterfeit its coin, or to protect false-coiners who dare to do so. See also 24 and 25 Vict., c. 99, § 18, against counterfeiting foreign coin in England.



§ 4. By the term *property*, we understand the ownership of a thing, or the exclusive right of possessing, enjoying and disposing of it. Things owned by individuals, or corporate bodies, are termed *private property*, and those owned by the State are called *public property*, or the property of the State. The property of a State is therefore very different from its sovereignty, or the prerogatives of its ruler. In speaking of real property, whether of individuals or of States, the term *domain* is frequently used. 'A distinction,' says Bouvier, 'has been made between *property* and *domain*. The former is said to be that quality which is conceived to be in the thing itself, as it is considered as belonging to such or such person exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence, domain and property are said to be correlative terms; the one is the active right to dispose, the other a passive quality, which follows the thing and places it at the disposition of the owner. But this distinction is too subtle for practical use.' The term domain, as applied to the property of a State, is divided by Proudhon into two classes: 'The *public domain*, which applies to that kind of property which the government holds as a mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, &c., and which are not, as of course, alienable; <sup>1</sup> and the *domain of the State*, which applies only to things in which the State has the same absolute property as an individual would have in like cases.' Although these particular terms are not in general use with us, we nevertheless distinguish between the terms 'public lands' and lands which have been purchased or reserved for any particular use of the government, or of one of its departments, for laws relating to 'public lands' do not apply to

<sup>1</sup> 2 *Feud.*, t. 56; *Crag.*, t. xv. 15. In England also it is for the King to assign all *legal ports*, which are the gates of the realm. In the reign of King John a ship was seized for putting in at a place which was not a legal port. Maddox, *Hist. Exch.*, § 30. A court of Port-Mote is incident to every legal port, 4 *Inst.*, 148. See also 4 Hen. IV., c. 20; 1 Eliz., c. 11; 13 and 14 Car. II., c. 11; 46 Geo. III., c. 153; 39 and 40 Vict., c. 36.

Further, in England, the King has the right of erecting all lighthouses, beacons, and seamarks. *Rob. Claus.*, 1 Ric. II., m. 42; *Sid.*, 158; 4 *Inst.*, 149. The 8 Eliz., c. 13, empowered the corporation of the Trinity House to erect beacons, &c., and this statute has been since held to extend to lighthouses. See 17 and 18 Vict., c. 104, § 389; McCulloch, *Com. Dic.*, tit. Lighthouse, Trinity House.



lands so purchased or reserved. Ortolan distinguishes between the property which the State holds by virtue of its interior laws, and that which it holds by virtue of its international rights under the law of nations. The right of the State to the former is said to be *absolute*, as against everybody, while its right to the latter may be absolute only as against other States, and merely *paramount* when considered with respect to its own members and their rights of property in the same things. The former, Ortolan calls *the private or public domain of the State* ('domaine privé, ou domaine public de l'état'), and the latter he calls *international domain*, or *property between States* ('domaine international, ou propriété d'état à état').<sup>1</sup>

§ 5. The term *dominium*, as used by the civilians, when applied to property, has several significations. Erskine says: 'The interest which the superior retains to himself in all feudal grants is called *dominium directum*, because it is the highest and most eminent right, and that which the vassal acquires goes under the name of *dominium utile*, as being subordinate to the other.' The full and absolute ownership, *dominium plenum*, includes both the *directum* and the *utile*. The term *dominium eminens* is not, properly speaking, property, but a right of the State *over* the property of individuals. It is defined in Cooper's Justinian, 'the right of the public, in cases of emergency, to seize upon the property of individuals, and convert it to the public use.' Bowyer says, the *jus eminens* 'is that right which the entire body has over the members and whatever belongs to them, and which, being for the common good, is superior to the private rights of individuals belonging to their private interests. This *jus eminens* is called by writers on public law *dominium eminens*, when it regards *property*. It is the right of the State, or the sovereign power, over property within it, when necessity or the public good requires. This is the true foundation of the right of taxation.' Again, he says the right called *dominium eminens* 'is a part of the sovereign authority, and one of the *jura majestatis*.' Vattel defines *dominium eminens*, or *eminent domain*

<sup>1</sup> Proudhon et Dumay, *Domaine Public*, tome i. chs. xiv. xx.; Ortolan, *Domaine International*, §§ 13 et seq.; Rutherford, *Institutes*, vol. ii. ch. ix. § 6; *American Jurist*, No. 37, p. 121; Bouvier, *Law Dictionary*, verb. 'domaine'; Crittenden, *Opinions U. S. Attys. Genl.* vol. v. p. 578; Cushing, *Opinions U. S. Attys. Genl.* vol. vi. p. 670; Wilcox v. Jackson, 13 *Peters R.* 513.

to be, 'the right which belongs to the society or the sovereign, of disposing, in case of necessity and for the public safety, of all the wealth contained in the State.' But this definition is obviously defective and incorrect. Chancellor Walworth says: 'All separate interests of individuals in property are held of the government,' and 'notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity, and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest, or even the expediency of the State is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement.'

It is seen, from these definitions, that the term *eminent domain* is applied to one of the *jura majestatis*; it is that highest right over property which is in the government, and is never granted to the individual, and, therefore, is essentially different from what is ordinarily understood by the word property. The term *eminent domain*, properly speaking, is not applicable to the property of the State, but only to the property of individuals, for the right of the State to dispose of its property results from its right of ownership, and not from the right of eminent domain, which latter right remains in the State after it has transferred the ownership of its property. It is a right which, from its very nature, is inseparable from the sovereignty, and is necessarily transferred with the sovereignty.<sup>1</sup>

<sup>1</sup> Erskine, *Institutes*, pp. 231, 312; Cooper, *Justinian*, p. 442; Bower, *Universal Public Law*, pp. 227, 372; Vattel, *Droit des Gens*, liv. i. ch. xx. § 244; Domat, *Des Lois Civiles*, lib. i. tit. ii. § 13; Sedgewick, *Stat. and Con. Law*, pp. 500 et seq.; *Beekman v. S. S. R. R. Co.*, 3 *Paige R.* p. 73; *Varrick v. Smith*, 5 *Paige R.* p. 159; *Pollard's Lessee v. Hagan*, 3 *Howard Rep.* p. 223; Bello, *Derecho Internacional*, pt. i. cap. iv. § 1; Riquelme, *Derecho Publico Int.*, lib. i. tit. i. cap. ii.; Burlamaqui, *Droit de la Nat. et des Gens*, tome iv. pt. ii. ch. v.; *Gilmer v. Lime Point, Cal. Rep.* April term, 1861; *American Law Reporter*, vol. xix. pp. 254 et seq. In 1870 Her Majesty Queen Victoria, by order in Council, and in accordance with the wishes of Parliament, surrendered the ancient prerogative of government of the Army. By this step the General Commander-in-Chief becomes a subordinate of the Minister of War.



§ 6. A State, being regarded in public law as a body politic, or distinct moral being, naturally sovereign and independent, it is considered as capable of the same rights, duties and obligations, with respect to other States, as individuals with respect to other individuals. Among the most important of these natural rights is that of acquiring, possessing and enjoying property. And this right applies not only to property of the State, as exclusive of other States, but to such property as exclusive of individuals. But international law generally considers only the former kind of property, or international domain. When, however, we consider the rights of conquest and cession, the rights of maritime capture and of capture on land, it becomes necessary to consider the interior or municipal rights of property in the State; and to distinguish between the absolute and paramount rights of the State, in respect to property considered in its interior relations under municipal laws, rather than its exterior relations under international laws. As a general rule, the property of a State, of whatsoever description, is marked by the same characteristics relatively to other States, as the property of individuals relatively to other individuals; that is to say, 'it is exclusive of foreign interference, and susceptible of free disposition.'<sup>1</sup>

§ 7. A State may acquire property or domain in various ways: its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of

<sup>1</sup> A Sovereign Prince is exempted from the jurisdiction of the tribunals of the State in which he happens to be, absolutely so far as his person is concerned, and with respect to his property, at least so far as that is connected with the dignity of his position and the exercise of his public functions. No proceedings *in rem* can be instituted against the property of a Sovereign Prince if the *res* can, in any fair sense, be said to be connected with the *jus coronæ* of the Sovereign; but other property of a Sovereign may be proceeded against *in rem*.

A Sovereign Prince, by engaging in trade, may waive the privilege which he otherwise possesses of being exempt from the jurisdiction of the tribunals of a State, in respect of the property so engaged. A ship belonging to a foreign Sovereign, but used by him as a merchant vessel for trading purposes, is liable to be proceeded against *in rem* in the British Admiralty Court for damage done to another ship by collision. *Semble*, that mail packets, although the property of a Government, are not exempt from the ordinary process of the tribunals of a foreign State, unless expressly exempted by treaty.

The Khedive of Egypt is not a Sovereign Prince, and is therefore not entitled to claim the exemption for himself and his property, from the ordinary process of the courts of Great Britain, which is by international law founded upon the comity of nations accorded to foreign Sovereigns.—'The Charkieh,' Aspinall's *Mar. L.C.*, 581.



time ; or by discovery and lawful possession ; or by conquest, confirmed by treaty or tacit consent ; or by grants, cession, purchase, or exchange ; in fine, by any of the recognised modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition, any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence.<sup>1</sup>

§ 8. A sovereign State has the same absolute right to dispose of its territorial or other public property, as it has to acquire such property, but it depends upon its own municipal constitution and laws, how, and by what department of its government, the disposition shall be made. This is sometimes a question of peculiar interest to foreign States, who may acquire such property by purchase, exchange, cession, conquest, and treaties of confirmation, and especially where such acquisitions are made from States continually subject to revolutions and fluctuations in the character of its government and in the powers of its rulers. The act of a government *de facto*, a Government which is submitted to by the great body of the people, and recognised by other States, is binding as the act of the State ; and it is not necessary for others to examine into the origin, nature and limits of that authority. If it is an authority *de facto*, and *sufficient* for the purpose, others will not inquire how that authority was obtained.<sup>2</sup>

§ 9. Nevertheless, in order to make such transfer valid, the authority, whether *de facto* or *de jure*, must be competent to bind the State. Hence the necessity of examining into and ascertaining the powers of the rulers, as the municipal constitutions of different States throw many difficulties in the way of alienations of their public property, and particularly of their territory. Especially, in modern times, the consent

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. §§ 1, 4, 5 ; Puffendorf, *de Jur. Nat. et Gent.* lib. iv. chs. iv. v. vi. ; Moser, *Versuch*, etc. b. v. cap. ix. ; Schmaltz, *Droit des Gens*, liv. iv. ch. i. ; Klüber, *Droit des Gens*, §§ 125, 126 ; Burlamaqui, *Droit de la Nat. et des Gens*, tome iv. pt. iii. ch. v.

<sup>2</sup> Phillimore, *On Int. Law*, vol. i. §§ 150, 283 et seq. ; Kent, *Com. on Am. Law*, vol. i. p. 166 ; Webster to De la Rosa, Aug. 25, 1851 ; Cong. Doc. 32nd Cong. 1st sess. Senate, Ex. Doc. No. 97 ; Bello, *Derecho Internacional*, pt. i. cap. iv. § 2 ; Heffter, *Droit International*, § 71 ; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. 2.

of the governed, express or implied, is necessary, before the transfer of their allegiance can regularly take place. But formerly, what Grotius calls *patrimonial kingdoms* were considered in the light of absolute property of particular families, who, having received the blind submission of their subjects, sold and bartered them away, like any other property which they possessed. And such transfers of sovereignty included, not only the right of eminent domain, and the absolute property of the Sovereign or State, but all private lands, and the property and services of the subjects, who were transferred with the soil, in the same manner as a slaveholder may transfer his slaves and all they possess, together with the title to his plantation.<sup>1</sup>

§ 10. There are numerous examples of such treaties of sale. In 1301, Theodoric, Landgrave of Thuringia, sold the Marquisate of Lusatia to Burchard, Archbishop of Magdeburg, for 600 marks of silver,—‘*insuper cum ministerialibus, Vasallis et Mancipiis, et aliis hominibus cujuscunque conditionis in jam dicta terra commorantibus,*’ &c. In the same manner, in 1311, Dantzic, Derschovia and Swiecae, were sold by the Margrave of Brandenburg to the Grand Master of the Teutonic Order, for 10,000 marks. In 1333, the city and territory of Mechlin was transferred for one hundred thousand reals of gold, by a treaty of sale between its Sovereign and the Earl of Flanders, the fealty being reserved. About the same time, the city and county of Lucques were sold by John of Luxemburg to Philip of Valois, for 180,000 florins; and a few years after, the sovereignty of Frankenstein was sold by the Duke of Silesia, for 2,000 marks, to the King of Bohemia. The sovereignty which the Popes so long held over Avignon was purchased by Clement VI., for 80,000 florins, from Jane, Queen of Naples and Countess of Provence.<sup>2</sup>

§ 11. The practice also extended to the mortgaging of sovereignties, and the sales of reversionary interests in kingdoms. Thus, Robert, Duke of Normandy, in order to raise money to engage in the first crusade, mortgaged his duchy for 6,666 lbs. weight of silver, to his brother William, and trans-

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. iii. ch. xi.

<sup>2</sup> Ward, *Law of Nations*, vol. ii. pp. 256-260; Dumont, *Corps Dip.* liv. ii. pp. 330, 364, 365; Dupuy, *Droits de Roy F. C.* p. 70; Leibnitz, *Cod. Dip.* p. 200. Alaska was purchased from Russia by the United States by treaty of March 13, 1867.



ferred the possession before his departure for the Holy Land. In 1479, Louis XI. bought the right of the house of Penthièvre, the next male heirs in reversion, to Brittany. And fifteen years later, Charles VIII. purchased, for an annual pension of 4,300 ducats, an estate of 5,000, in lands in France or Italy, and the disposition of the Morea (when conquered), of Paleologus, the nephew of Constantine, the last Christian Emperor, his right to the whole Empire of Constantinople. The act of sale being drawn up by two notaries, and ratified, Charles assumed the robes and ornaments of the imperial dignity, and made no scruples in claiming the imperial rights vested in him by virtue of this purchase.<sup>1</sup>

§ 12. It was also the custom to dispose of sovereignties and dominions by deeds of gift, and by bequests. The Emperor Lewis V. created the dauphin Humbert *king*, with the full privilege of disposing of his sovereignty at will, during life, or at his death. In 1343 Humbert ceded his dominions to Philip of Valois, by solemn deed of gift. By similar deeds, and upon a like principle, the Emperor Henry VI. conferred upon Richard I. the kingdom of Arles, and the Emperor Baldwin gave to the Duke of Burgundy the kingdom of Thessalonica. By bequests, not only were whole sovereignties disposed of, but the orders of succession were frequently changed. Thus, Charles II., King of Sicily and Count of Provence, changed by will the order of succession to the county, and the claims of Charles VIII. to the throne of Naples were founded upon the adoption of Louis of Anjou, by Jane, Queen of Naples, 1380, which was evidenced to all Europe by a solemn and public deed.<sup>2</sup>

§ 13. National territory consists of water as well as land. The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other

<sup>1</sup> Russell, *Hist. Modern Europe*, vol. i. pp. 185, 472; White, *Hist. of France*, p. 208.

<sup>2</sup> Leibnitz, *Cod. Dip.* pp. 51, 237, 158, 220, 382; Pfeffel, *Droit Pub. d'Allemagne*, tome i. p. 541; Henault, *Hist. Chron.* tome i. p. 315. In 1544 the English Parliament declared the succession to the Crown, but omitted to make any arrangement in the case of failure of issue of the children of Henry VIII. The King, *by his will*, named the descendants of his sister Mary, Duchess of Suffolk, as heirs in case of such failure.



State. The general usage of nations superadds to this extent of maritime territory an exclusive territorial jurisdiction over the sea for the distance of one marine league, or the range of a cannon-shot, along all the shores or coasts of the State. The maxim of law on this subject, is, *terrae dominium finitur ubi finitur armorum vis*, which is usually recognised to be about three miles from the shore.<sup>1</sup> And even beyond this

<sup>1</sup> In the case of the 'Franconia' (Reg. v. Keyn), a prisoner was indicted at the Central Criminal Court for manslaughter. He was a foreigner, and in command of a foreign ship, passing within three miles of the shore of England, on a voyage to a foreign port; and whilst within that distance, his ship ran into an English ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. It was held by the majority of the Court (Cockburn, C.J., Kelly, C.B., Bramwell, J.A., Lush and Field, J.J., Sir R. Phillimore and Pollock, B.), on the ground that prior to 28 Hen. VIII. c. 15 the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and because the subsequent statutes only transferred to the common law courts the jurisdiction formerly possessed by the admiral, that therefore, in the absence of statutory enactment the Central Criminal Court had no power to try the above offence. On the other hand, Lord Coleridge, C.J., Brett and Amphlett, J.J.A., Grove, Denman, and Lindley, J.J., held that the sea within three miles of the coast of England is part of the territory of England; that the English criminal law extends over those limits; and that the admiral formerly had, and the Central Criminal Court now has, jurisdiction to try offences there committed, although on board foreign ships.

Lord Chief Justice Cockburn, in the course of a very exhaustive summing-up, representing the opinion of the majority of the Court, thus epitomised the contention for the prosecution:—

'Although the occurrence on which the charge is founded took place on the high seas in this sense, that the place in which it happened was not within the body of a county, it occurred within three miles of the English coast; by the law of nations the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs; and consequently the "Franconia," at the time the offence was committed, was in English waters, and those on board were therefore subject to English law.' He then observes:—'From the earliest period of English legal history, the cognizance of offences committed on the high seas had been left to the jurisdiction of the admiral. Every offence was triable only in the county in which it had been committed. If an offence was committed in a bay or gulf, *inter fauces terræ*, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties; but along the coast, on the external sea, the jurisdiction of the common law extended no further than to low-water mark.

'The office of coroner could not be executed by the coroner of a county in respect of matters arising on the sea. An inquest could not be held by one of these officers on a body found on the sea. Such jurisdiction could only be exercised by a coroner appointed by the admiral.

'A similar difficulty existed as to wrongs done on the sea, and in respect of which the party wronged was entitled to redress by civil action,

limit, States may exercise a qualified jurisdiction for fiscal and defensive purposes, that is, for the execution of their

till the anomalous device of a fictitious venue within the jurisdiction of the common law courts, and which those courts did not allow to be disputed, was resorted to, and so the power of trying such actions was assumed. . . .

'15 Ric. II. c. 3, gave the admiral concurrent jurisdiction with the common law, in respect of "the death of a man and of a mayhem done in great ships being and hovering in the main stream of the great rivers, only beneath the points of the same rivers, and in no other place of the same rivers." . . .

'On the shore of the outer sea, the body of the county extends so far as the land is uncovered by water, and between high and low water-mark the jurisdiction has been divided between the Admiralty and the common law, according to the state of the tide. . . .

'We must therefore deal with this case as one which would have been under the ancient jurisdiction of the admiral. But the jurisdiction of the admiral, though largely asserted in theory, was never, so far as I am aware—except in the case of piracy, which, as the pirate was considered the *communis hostis* of mankind, was triable anywhere—exercised or attempted to be exercised in respect of offences over other than English ships. No instance of any such exercise or attempted exercise, after every possible search has been made, has been brought to our notice. Though, by 25 Hen. VIII. c. 15, the trial of offences previously within the jurisdiction of the admiral, was transferred to commissioners, I think that all that was effected by this statute or by those who have succeeded, as regards jurisdiction, was a transfer of the criminal jurisdiction of the admiral, such as it was, to courts proceeding according to the ordinary procedure of the common law. The 4 and 5 Wm. IV. c. 36, which gives power to the Central Criminal Court to try "offences committed on the high seas and other places within the jurisdiction of the Admiralty of England," has obviously carried the matter no farther. If the admiral had not jurisdiction as to offences committed on foreign ships, the commissioners must be equally without it.' He then cites *Reg. v. Serva and others* (1 *Den. Cr. C.* 104); and *Reg. v. Lewis* (1 *Deares and B. Cr. C.* 182) in support of the want of jurisdiction. The former case occurred off the coast of Africa, and decides that an English court of justice has no authority to try a foreigner, accused of having committed an offence on a foreign vessel, not within British waters. In the latter case, a foreign sailor was wounded on the high seas, but died at Liverpool of the injury. A conviction was sought under the provisions of 9 Geo. IV. c. 31 § 8, but it was held that the statute did not apply to foreigners for acts committed out of British territory. He also cites the American cases, *Palmer's case* (3 *Wheat.* 610); the *U. S. v. Howard* (3 *Wash. C.C. R.* 340); the *U. S. v. Klintock* (5 *Wheat.* 144); the *U.S. v. Kessler* (*Bald.* 15); the *U.S. v. Holmes* (*ibid.*). He then proceeds to observe that 'the jurisdiction of the admiral, however largely asserted in theory in ancient times, being abandoned as untenable, it was necessary for the Crown to have recourse to a doctrine of comparatively modern growth—namely, that a belt of sea to a distance of three miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high sea beyond such limit.' He adds, that 'the three-mile belt is a doctrine unknown to the ancient law of England,' although he admits



revenue laws, and to prevent 'hovering on their coasts.'<sup>1</sup> It is necessary to distinguish between *maritime territory* and

that, as shown by the 4 *Inst.*, Selden's *Mare Clausum*, b. 2, Lord Hale, *De Jure Maris*, and by Sir Leoline Jenkins, the kings of England at an early period claimed sovereignty over the narrow seas. He next examines the various writers who, while maintaining the freedom of the seas, have expressed an opinion that an exclusive right might be acquired in respect of certain parts of the sea adjoining individual states, such as Grotius, *De Jur. Bell. et Pac.*, lib. ii. c. 2 § 13; Albericus Gentilis; Baldus; Bodinus; Loccenius, *De Jur. Mar.*, ch. iv. § 6; Puffendorf, lib. iv. c. 2 § 8; Casaregis, *Discursus de Com.*; Bynkershoek, *De Dom. Mar.* He points out that to this latter is apparently due, the first suggestion of a territorial dominion over the sea, extending as far as a cannon shot would reach, a distance which succeeding writers had fixed at a marine league or three miles, and that this suggestion has been followed, with few exceptions, by later publicists; but in the practical application of this rule, in respect of the particular of distance, and in the more essential particular of the character and degree of dominion, he thinks great uncertainty exists. Some authors, among them Bluntschli, draw a distinction between a commorant and a passing ship: the former, they say, is subject to the general law of the local State; the latter merely to the local jurisdiction in matters of the safety of the coast. The unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local State might, in the opinion of the Lord Chief Justice, go far to show that by the concurrence of other nations such a State may deal with these waters as subject to its legislation, but he thinks that it fails to show that in the absence of such legislation the ordinary law of the local State would extend over the waters in question. Finally, he is of opinion that, although the littoral sea around England is English territory for some purposes, yet that the criminal law of England does not prevail over it. *Reg. v. Keyn*, 2 *L. R.* (Exch. Div.).

This decision is much to be regretted. It would seem, however, that the criminal law might be extended over the littoral sea, by Act of Parliament.

<sup>1</sup> The observations contained in the following references are worthy of comparison. Casaregis (*Disc. de Comm.*, § 136) says that the sovereign possessing the coast has equal sovereignty over the sea for 100 miles, with criminal jurisdiction, the power of tolls, and of prohibition to ships from passing.

Craig (*Jus Feud.*, lib. i. § 13 p. 140) says: 'Reges inter se quasi omnia maria dividerint . . . id mare censeatur quod alteri propinquius . . . in quo si delictum aliquod commissum fuerit, ejus sit jurisdictio qui proximum continentem possideat.'

Vattel (*Droit des Gens*, 288) says: 'Powers extend their dominion over the sea as far as they can protect their right. It is of importance to the safety and welfare of the State that it should not be free to all the world to come so near to its possessions, especially with ships of war. . . . But then the nation cannot refuse access to ships not suspected, or making innocent use of its waters.'

Pascal Fiore (vol. i. p. 370) says: 'Every nation has a *dominium utile* on the sea which washes its shores, in the interest of its preservation. It exercises besides a right of jurisdiction and police in the interest of its defence. . . . But publicists are not agreed as to the extent of the territorial sea, and the limit of the use (*domaine utile*) which the State may exercise.'

Haurefeuille says (*Des Droits des Neutres*, 197) that nations can 'prohibit the vessels of all other nations, or of any particular nation,



territorial jurisdiction, which latter will be discussed in another chapter.<sup>1</sup>

§ 14. The term 'coasts' does not properly comprehend all the *shoals* which form sunken continuations of the land perpetually covered with water, but it includes all the natural appendages of the territory which rise out of the water, although they may not be of sufficient firmness for habitation or use. No matter whether such appendages are composed of mud or of solid rock, they are considered as a part of the territory of the main land, the right of dominion not depending upon the texture of the soil. This question was directly decided in a case which had reference to a little mud island at the mouth of the Mississippi river, composed of earth and trees drifted down by the river, and not of sufficient consistency to support the purposes of life.<sup>2</sup>

§ 15. Another case, involving the international right of

from navigating territorial waters, or may prohibit the navigation for particular purposes. Foreigners entering this reserved territory must submit to the law of the sovereign in all that concerns their relations with the land and its inhabitants, as though they were on the land. The limit of the territorial sea is fixed by the principle from which its territorial character arises—as far as it can be commanded from shore.<sup>3</sup>

Ortolan says (*Diplom. de la Mer*, liv. ii. c. 8) that as soon as there is sufficient depth for navigation, nations are entitled, as of right, to the use of the sea as a means of communication, but that the territorial sea may be made use of for the defence of a country, and a State may make laws 'lois de police et de sûreté' over the same. The State has over that space, not property, but a right of empire; a power of legislation, supervision, and jurisdiction, conformably to the rules of international jurisdiction.

See also the remarks of Sir W. Scott in the 'Maria' (1 Rob., 352), and the 'Twee Gebroeders' (3 *Ibid.*, 162); also the 'Leda' (*Swa. Adm.*, 40); the General Iron Screw Colliery Co. v. Schurmanns (17 Q. and H., 180); the Free Fishers of Whitstable and Gann (11 C.B., N.S., 387, and 2 H. L. C., 192); Gammell v. Woods and Forests (3 Macq., 419); the 'Ann' (1 Gall., 62); the 'Exchange' (7 Cranch., 136); the Admiralty (12 Co. Rep., 79); and the 21 and 22 Vict. c. 109.

<sup>1</sup> Ch. vii. and also ch. x., §§ 13 *et seq.*—Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. iii. § 10; Bynkershoek, *Quaest. Jur. Pub.*, lib. i. cap. viii.; Bynkershoek, *De Dominio Maris*, cap. ii.; Polson, *Law of Nations*, § 5; Vattel, *Droit des Gens*, liv. i. ch. xxiii. § 289; Valin, *Com. sur l'Ord.*, liv. v. tit. i.; Azuni, *Droit Maritime*, tome i. ch. ii. art. iii.; Gardén, *De la Dip.*, tome i. p. 399; Hautefeuille, *Droit des Nations Neut.*, tit. i. ch. iii. § 1; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. viii.; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 40; Pistoye et Duverdy, *Traité des Prises*, tit. ii. ch. i. § 1; Heffter, *Droit International*, §§ 65 *et seq.*; Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. cap. iii.; Loccenius, *De Jur. Maritimo*, lib. i. cap. iv. § 6.

<sup>2</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. § 7; the 'Anna,' 5 Rob. R. 385; Wildman, *Int. Law*, vol. i. pp. 39, 70.

domain and property, is that of islands in the sea, which do not derive their elements, on the principle of alluvium and increment, immediately from the main shore, but are separated from it by deep channels of a greater or less width. Such islands, if in the vicinity of the main land, are regarded as its dependencies, unless some one else has acquired title to them by virtue of discovery, colonisation, purchase, conquest, or some other recognised mode of territorial acquisition. The ownership and occupation of the main land includes the adjacent islands, even though no positive acts of ownership may have been exercised over them. In such a case, the attempt of another power, without title, to colonise them, would be a just cause of complaint, and, if persisted in, of war. But if such islands be in the sea, distant from the main land, their ownership follows the general rule of discovery, occupancy, colonisation, purchase and conquest.

By the Act of Congress, approved August 18, 1856, when any citizen of the United States discovers a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and shall take peaceable possession thereof, and occupy the same, such island, rock or key may, at the discretion of the President of the United States, be considered as appertaining to the United States, and the land and naval forces may be employed by the President to protect the rights of such discoverers, or their assigns. Nevertheless, such islands, rocks or keys, are not made a part of the union of the United States; and all acts done, and offences or crimes committed thereon, or in the waters adjacent thereto, are to be held and deemed to have been done or committed on the high seas, on board a ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels, and offences committed on the high seas.<sup>1</sup>

§ 16. The exclusive right of domain and territorial jurisdiction, of the British crown, have immemorially extended to the bays or portions of the sea cut off by lines drawn from

<sup>1</sup> Brightley, *Digest of the Laws of the U. S.*, p. 301; Ortolan, *Domaine International*, § 93.



one promontory to another, along the coasts of the island of Great Britain. They are commonly called the *king's chambers*. A similar jurisdiction, or right of domain, is also asserted by the United States over the Delaware Bay, and other bays and estuaries, as forming portions of their territory. Other nations have claimed a right of territory over bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands along their respective coasts, and the principle would seem to be pretty well established as a rule of international law.<sup>1</sup>

§ 17. The principle of this rule is not now contested, but differences have arisen with respect to its limitation, and its application to particular cases, or, in other words, as to what constitutes a bay or estuary, or mouth of a river, and what must be regarded as a portion of the open sea, which is the property or territory of no one, but is common to all nations. By the treaty of 1818, between the United States and Great Britain, the former 'renounced for ever any liberty heretofore enjoyed, or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America,' &c. From 1849 to 1852, serious difficulties occurred between the inhabitants of the two countries with respect to the construction of this treaty; the one contending that the *three miles* were to be measured from a line uniting the extreme headlands of the coasts of Nova Scotia, while the other party objected to this, on the ground that the line so drawn cut off large portions of the open sea, or broad estuaries, which were the common property of all: and that such line must be drawn from one headland to the next adjacent, so as not to include these broad bays, or slight indentations, which were properly portions of the open sea. Serious collisions were at one time apprehended between the men-of-war sent by the two governments to protect their respective fisheries. A mutual forbearance, however, prevented a resort to force, and a negotiation was set on foot, which, in 1854, resulted in a joint commission of the two nations, to designate the mouths of rivers, etc., to which the common

<sup>1</sup> Sir L. Jenkins, *Life and Works*, vol. ii. pp. 727-8, 780; 'Le Louis,' 2 *Dodson R.* 245; *Church v. Hubbard*, 2 *Cranch R.* 187; *Case of the Washington*, *Com. between the U. S. and G. B.* pp. 170-186.



right of fishery on the coasts of the United States and of the British Provinces was not to extend.<sup>1</sup>

§ 18. But, besides this claim of maritime territory over the mouths of rivers, bays and estuaries along the coast, different nations have at different times asserted a right of property to certain narrow seas and straits adjacent to their shores, and outside of any lines joining one cape or promontory with another. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the Adriatic; the supremacy claimed by England over the narrow seas; and the supremacy asserted by the King of Denmark over the sound and the two belts which form the outlet of the Baltic Sea into the ocean. Such claims have generally been placed on the ground of immemorial use, or prescription. The honours and duties demanded by the State asserting such maritime supremacy have been paid or refused by other nations, according to circumstances, but the claim itself has never been sanctioned by general acquiescence.<sup>2</sup>

§ 19. The claim of Denmark, to impose what are called *sound dues*, was rested by the Danish publicists and diplomatists, not only upon immemorial prescription, sanctioned by a long succession of treaties with other powers, but upon a kind of vested right, originating in remote antiquity, recognised by the system of public law subsequently subsisting, and ratified by the acquiescence of all maritime nations from time immemorial; and they said the claim was originally founded in equity, and still has equitable considerations in its favour, in virtue of the expenses incurred by Denmark in improving the navigation of the sound for the general benefit of commerce. They admitted 'that the general principles of the law of nations would now hardly seem to sanction the imposition of tolls similar to the sound dues, where none before had existed.' The United States denied the *right* of Denmark to collect such dues, and 'adopted the conclusion

<sup>1</sup> Cong. Docs. 32nd Cong. 1st Sess. Senate Ex. Doc. No. 100, Spe. Sess. No. 3; President's Message, Cong. Doc. 1855-6; *Annales Marit. et Colo.* 1839, part i. p. 861; Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. § 8; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 41.

<sup>2</sup> See ante, ch. v. § 18. Selden, *Mare Clausum*, passim; Stymann, *De Jure Maritimo*, lib. i. cap. iv. p. 179 et seq.; Gunther, *Europ. Völkerrecht*, t. ii. p. 46; Rayneval, *Inst. du Droit Nat.*, liv. ii. ch. x.; Bowyer, *Universal Public Law*, ch. xxviii.; Heffter, *Droit International*, § 75; Hautefeuille, *Des Nations Neutres*, pt. i. ch. iii. § 2.

that they are under no obligation arising from international law or treaty stipulation, to yield to this claim,' while they admitted the 'necessity to keep up, at considerable expense, lighthouses, buoys, etc., for the security of this navigation,' and that the expenditure made by Denmark, for this purpose, 'may constitute an equitable claim upon foreign powers for remuneration to the extent they have participated in this advantage,' and that 'they would not hesitate to share liberally in compensating Denmark for any fair claim for expenses she may incur in improving and rendering safe the navigation of the sound.' 'In claiming an exemption of our ships and their cargoes from taxation, by Denmark, at the straits of the Baltic,' continues Mr. Marcy, the American Secretary of State, 'the United States are vindicating a great national principle of extensive and various application. If yielded in one instance, it will be difficult to maintain it in others. If exactions upon our trade at the entrance of the Baltic were acquiesced in by the United States, similar exactions might, on the same principle, be demanded at the Straits of Gibraltar and Messina, at the Dardanelles, and on all great navigable rivers whose upper branches and tributaries are occupied by different independent powers.' The dispute was amicably arranged by the convention of February 12, 1858, the sound and belts being made entirely free to American vessels and their cargoes, the United States paying a fixed sum *en bloc* for lighthouses, buoys, etc.<sup>1</sup>

§ 20. No one would now think of reviving the controversy which once occupied the pens of the ablest European jurists, with respect to the right of any one State to appropriate to its own use, and to the exclusion of others, any part of open sea or main ocean, beyond the immediate vicinity of its own coast; but it has sometimes been attempted to extend the principle of *mare clausum* to inland seas, not entirely enclosed within the territorial limits of a single State. Thus, in the treaties of armed neutrality of 1780 and 1800, and in the treaty of 1794, between Denmark and Sweden, the tranquillity

<sup>1</sup> *President's Messages*. Dec. 1854 and 1855; Marcy, *Cor. Dep. of State, on Danish Sound Dues*; Wildman, *Int. Law*, vol. i. ch. ii.; Webster's *Life and Works*, vol. vi. p. 466; Cong. Doc. *H. of R.* 33rd Cong. 1st Sess. Ex. Doc. 108. In 1857 Great Britain also had compounded by the payment of 1,125,205*l.*



of the Baltic Sea was proclaimed and guaranteed ; and in the Russian declaration of war against Great Britain of 1807, the inviolability of that sea, and the reciprocal guarantees of the powers bordering upon it, were stated as aggravations of the British proceedings, in entering the sound and attacking the Danish capital in that year. This attempt, on the part of the Baltic powers, to establish in themselves the exclusive control of the Baltic Sea, contrary to the well-established principles of international law, greatly weakened the force of their complaints against the proceedings of Great Britain toward Denmark. The law of nations does not permit any number of nations, bordering upon a sea, to combine together to close it against the commerce of the rest of the world.<sup>1</sup>

§ 21. It is generally admitted that the territory of a State includes the seas, lakes and rivers entirely inclosed within its limits. Thus, so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might, with propriety, be considered as a *mare clausum* ; and there seemed no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being also portions of the Turkish territory. But when Turkey lost a part of her possessions bordering upon this sea, and Russia had formed her commercial establishments on the shores of the Euxine, both that empire and other maritime powers became entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognised by the treaty of Adrianople in 1829. But the right of free navigation of the Black Sea, and the consequent right of passage through the Dardanelles and the Bosphorus, was not construed to interfere with the right of *territorial jurisdiction* which the Ottoman Porte exercises over these straits.

<sup>1</sup> Bynkershoek, *De Dominio Maris*, cap. vii. ; Vattel, *Droit des Gens*, liv. i. ch. xxiii. §§ 279, 286 ; Ortolan, *Dip. de la Mer*, tome i. pp. 120-126 ; Polson, *Law of Nations*, sec. v. ; Bello, *Derecho Internacional*, pt. i. cap. ii. § 4 ; Hautefeuille, *Des Nations Neutres*, tit. i. chs. iii. iv. In consequence of the secret articles of Tilsit, England demanded the surrender of the Danish fleet, with the promise of its restoration when peace came. This proposal being rejected, Copenhagen was bombarded by the English fleet until Denmark accepted the proposal. Stern necessity and the law of self-preservation called for this measure on the part of England.



These straits are bounded on both sides by the territory of the Sultan, and are, in most parts, less than six miles wide, consequently, he has a right to exclude all foreign ships of war from entering or passing either the Dardanelles or the Bosphorus. This right has also been recognised in the treaties of 1840, 1841, and 1856, and may be considered as permanently incorporated into the public law of Europe.<sup>1</sup>

<sup>1</sup> Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. iv. ; Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. § 10 ; Martens, *Précis du Droit des Gens*, §§ 39, 156 ; Wheaton, *Hist. Law of Nations*, pp. 577, 583 ; Martens, *Nouveau Recueil*, tome viii. p. 143 ; Heffter, *Droit International*, § 76.

In 1871 a Conference met in London to consider certain complaints of Russia with respect to the Treaty signed at Paris on March 30, 1856, between England, Austria, France, Prussia, Russia, Sardinia, and Turkey, by which the Black Sea was neutralised, and its waters and ports made free to all nations for merchant shipping, but not for ships of war, and by which Russia and Turkey engaged to maintain only six light ships of war in that sea. In October 1870, the Russian Minister, Prince Gortschakoff, had addressed a despatch to the European Powers, declaring that Russia had ceased to recognise the obligations of the above treaty respecting the neutrality of the Black Sea. To which Lord Granville, on behalf of England, replied by insisting on the obligatory character of treaties.

Russia was, therefore, compelled to listen to reason, and to accept a Conference. Art. XIV. of the above treaty, by the way, had expressly stipulated that 'it cannot be annulled or modified without the consent of the Powers signing the present treaty.'

On this article, Count Beust observed, 'We could not conceive nor admit a doubt as to the absolute force of this reciprocal engagement, even should one or other of the contracting parties think itself in a position to advance the most substantial considerations against the maintenance of any of the stipulations of a treaty, of which it had been agreed to declare, beforehand, that it could never be either annulled or modified without the assent of all the Powers that signed it.'

On January 17, 1871, the Plenipotentiaries of Germany, Austria, Great Britain, Italy, Russia, and Turkey, at the Conference of London, formally recognised 'that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement.'

The result of the Conference was, that the neutralisation of the Black Sea was abrogated, and the principle of the closing of the Straits of the Dardanelles and the Bosphorus, such as it had been established by the separate convention of March 30, 1856, was maintained, with power to the Sultan to open the Straits in time of peace, to the vessels of war of the friendly and allied Powers, in the event that the Sublime Porte should consider it necessary, in order to secure the execution of the stipulations of the Treaty of Paris, 1856 ; the commission established by Art. XVI. of the Treaty of Paris, for the execution of the works necessary to clear the mouths of the Danube and neighbouring parts of the Black Sea from sand and other impediments, was prolonged for twelve years ; and all the works of the Commission were to continue to enjoy the same neutrality hitherto afforded to them. But this provision was in no way to affect the right of the Porte to send, as theretofore, its vessels of war

§ 22. The great inland lakes, and their navigable outlets, are considered as subject to the same rule as inland seas: where enclosed within the limits of a single State they are regarded as belonging to the territory of that State; but if different nations occupy their borders, the rule of *mare clausum* cannot be applied to the navigation and use of their waters. No distinction is made between salt-water lakes, or inland seas, and fresh-water lakes. The right of territorial jurisdiction over the outlets of these inland waters, when narrow, and of excluding foreign ships of war, will be particularly discussed in another chapter.

§ 23. A river which flows, for its entire length, through the territory of a State, is regarded as forming part of its dominion, including the bays and estuaries formed by its junction with the sea. Where the entire upper portion of a navigable river is included within a single State, the part so enclosed is undoubtedly the property of such State. Where a navigable river forms the boundary of conterminous States, the middle of the channel.—the *flum aquæ*, or *Thalweg*—is generally taken as the line of their separation, the presumption of law being, that the right of navigation is common to them both. But this presumption may be rebutted or destroyed by actual proof of the exclusive title of one of the riparian proprietors to the entire river. Such title may have been acquired by prior occupancy, purchase, cession, treaty, or any one of the modes by which other public territory may be acquired. But where the river not only separates the conterminous States, but also their territorial jurisdictions, the *Thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that

into the Danube, in its character of territorial power. This was signed March 24, 1871.



object. The division of the islands in the river and its bays would follow the same rule.<sup>1</sup>

§ 24. Where the dividing line of two States is water, as a river or lake, which is subject to changes, important questions may arise respecting the rights of property. Thus, where, by a gradual and insensible movement, the water advances on one side and recedes on the other, or by detrition on one side and deposit on the other, a portion of the soil is gradually transferred, there is evidently a loss to one State and an increase to the other. So also, where islands are washed away on one side of the channel, and new ones formed on the other, there is a corresponding change of territory. Again, suppose that the river or lake which constitutes the boundary has suddenly changed its bed, will this change produce a corresponding increase or diminution of territory to the adjacent proprietors? The Roman law determined with great care the effects of changes in the distribution of waters upon the ownership of private lands; and the influence of this law is manifest in the rules adopted by publicists with respect to international property.<sup>2</sup>

§ 25. Where the moving of the dividing water is so gradual as to be almost insensible, the changes produced are not considered as acquisitions and losses of property, but the natural consequences of property already existing; because, the thing owned is naturally susceptible of this physical increase or decrease. In such a case, whether the dividing water belongs entirely to one State, or the boundary is the middle or *Thalweg*, each party gains or loses accordingly as the increase or decrease is upon its side. The same rule applies to the gradual removal or formation of islands in a river or lake which divides States, or in the sea, within the territorial limits or *ligne de respect* of a State bordering upon the ocean. More-

<sup>1</sup> Gundling, *Jus. Nat.*, p. 248; Wolfius, *Jus Gentium*, §§ 106-109; Stypmannus, *Jus Marit.*, etc. cap. v. n. 476-552; Merlin, *Répertoire*, voc. 'alluvium'; Rayneval, *Droit de la Nature*, tome i. p. 307; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 57.

<sup>2</sup> Rayneval, *Inst. du Droit Nat.* liv. ii. ch. xi.; Pothier, *Œuvres de*, tome x. pp. 87, 88; Voet, *ad Pandects*, tome i. pp. 606, 607; Heineccius, *Recitaciones*, lib. ii. tit. i. §§ 356-369; *Las Siete Partidas*, part. iii. tit. xxviii. l. xxxi.; Alvarez, *Institutes*, lib. ii. tit. i. § 6; Asso, *Instituciones*, p. 101; Gomez, *Elementos*, lib. ii. tit. iv. § 3; *Febrero Mexicana*, tome i. p. 161; *Sala Mexicana*, tomo ii. p. 62; Justinian, *Inst.*, lib. ii. tit. i. §§ 20-24; De Camps, *Manuel des Prop. Riv.* passim; Chardon, *Droit d'Alluvion*, passim.



over, a State has a certain right of preemption to islands formed adjacent to its coast, even outside of this line of respect. But the case is very different where the river abandons its ancient bed and forms a new channel, or where a lake leaves its former banks and forms a new lake, or a series of new lakes; the boundaries of the States remain in the abandoned bed of the river, or in the position formerly occupied by the lake.<sup>1</sup>

§ 26. Where a navigable river, during a part of its course, flows through the territory or forms the boundary of one State, but passes through a third State before it enters the sea, questions of some difficulty have arisen with respect to its dominion and use. It is, however, now generally conceded that the right of navigation, for commercial purposes, is common to all the nations inhabiting the different parts of its banks. But this right of *innocent passage*, being what the text-writers call an *imperfect* right, its exercise is necessarily modified by the safety and convenience of the State which is affected by it, and can only be effectually secured by mutual conventions, regulating the mode of its exercise. In other words, the outlet of the river being entirely within the territorial jurisdiction of one State, that State may establish and enforce all proper and necessary regulations, so that this right of innocent passage shall neither endanger its own safety nor interfere with its own paramount right of legislation and jurisdiction. The Roman law declared navigable rivers to be so far public property that a free passage over them was open to everybody, but distinguished between rivers and the sea, the former being classed among *res publicæ*, and the latter among *res communes*.<sup>2</sup>

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. vii. cap. iii. § 17; Ortolan *Domaine International*, §§ 85-93; Heffter, *Droit International*, § 69 note; Gunther, *Europ. Völkerrecht*, t. ii. p. 57; Pestel, *Commentarii de Repub. Batav.* § 268; Bowyer, *Universal Public Law*, ch. xxviii.; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. iv.; Bello, *Derecho Internacional*, pt. i. cap. iii.; Pando, *Derecho Internacional*, p. 99; Almeda, *Derecho Publico*, tome i. p. 199; Cushing, *Opinions U. S. Att'ys. Genl.*, vol. viii. p. 175; Crittenden, *Opinions U. S. Att'ys. Genl.*, vol. v. pp. 264, 412; Puffendorf, *De Jur. Nat. et Gent.*, lib. iv. cap. v. § 8; Wolhus, *Jus Gentium*, §§ 108, 109; Proudhon et Dumay, *Domaine Public*, tome iv. ch. lvi. sec. 7.

<sup>2</sup> Justinian, *Institutes*, lib. ii. tit. i. §§ 1, 2; Phillimore, *On Int. Law*, vol. i. §§ 155-6; Vattel, *Droit des Gens*, liv. ii. ch. ix. §§ 126-130; ch. x. §§ 132-134; Puffendorf, *De Jur. Nat. et Gent.*, lib. iii. cap. iii. §§ 3-6; Polson, *Law of Nations*, sec. v.

§ 27. The Roman law also declares the right to use the shores to be an incident to that of the water, and the right to navigate a river carries with it the right to moor vessels to its banks, to lade and unlade cargoes, &c. Publicists have applied this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for the purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted. The principal right would seem to draw after it the incidental right of using all the means which are necessary to secure its proper enjoyment. But this incidental right, like the principal right itself, is *imperfect* in its nature, and the mutual convenience of both parties must be consulted in its exercise.<sup>1</sup>

§ 28. Such right of innocent passage, though an *imperfect* right, and requiring mutual conventions regulating the mode of its exercise, is nevertheless a real, subsisting right, founded upon the law of nature, and recognised by the most approved writers on public law. It may also be added that it has been recognised by the general consent of nations, and must now be regarded as an established principle of international law.<sup>2</sup>

§ 29. But those interested in the enjoyment of this principal right, and its incidents, may renounce them entirely, or consent to modify them in such a manner as mutual convenience and policy may dictate. Thus, by the treaty of Westphalia, the navigation of the river Scheldt was closed to the Belgic provinces, in favour of the Dutch; and by the treaties of Vienna, and subsequent conventions, the riparian powers, on the banks of the great rivers of Europe, agreed to certain detailed regulations respecting their navigation through the territory of the States in which such rivers débouched into the ocean. But this agreement of the riparian States to regulations of police and fixed toll duties on vessels and merchandise passing through the territory of another State, to and from the sea, or even an entire surrender or renouncement of the right, cannot be adduced as an argument against the existence of the right itself. On the contrary, if no such right existed, there would be no necessity for its

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. § 13.

<sup>2</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. iii. §§ 7-12; Heffter, *Droit International*, §§ 77-80.



regulation, and its renouncement would be an act of superelevation.<sup>1</sup>

§ 30. The navigation of the Rhine has often afforded matters of difficulty and dispute between the States which border on it, or through whose territories it flows. By *Annexe* sixteen to the final act of the congress of Vienna, in 1815, the free navigation of this river was confirmed 'in its whole course, from the point where it becomes navigable to the sea, ascending and descending.' The interpretation of these stipulations gave rise to a controversy between the kingdom of the Netherlands and other States interested in the navigation of that river, from the fact that the *Rhine*, properly so called, does not empty into the sea, but loses its waters among the sandy downs at Kulwick, the navigation being carried on, through the mouths or arms of the sea called the *Leck*, the *Yssel*, and the *Waal* and *Meuse*. After a long and tedious negotiation, the question was finally settled by the convention of Mayence in 1841, providing for the free navigation and commerce of the riparian States 'into the sea,' with minute regulations of police, and fixed toll duties on vessels and merchandise passing to and from the sea, and to the ports of the upper riparian States on the Rhine.<sup>2</sup>

§ 31. The same principle was extended in 1815, by the congress of Vienna, to the navigation of the *Neckar*, the *Mayn*, the *Moselle*, the *Meuse*, and the *Scheldt*; and similar provisions were made for the free navigation of the *Elbe* in 1821, and, at other periods, of the *Po*, the *Danube*, the *Vistula* and other rivers of ancient Poland. The treaty of Westphalia, 1648, by which the independence of the United Provinces was acknowledged by Spain, contained a stipulation by which the river *Scheldt* was to continue shut on the side of the former, who were proprietors of both banks, toward the sea. It was also stipulated that the inhabitants of the United Provinces should abstain from frequenting the places occupied by Spain in the East Indies. Another motive alleged by the Dutch for this stipulation, closing the navigation of the lower *Scheldt*, was, that the whole course of the two branches of this river, which passed within the domi-

<sup>1</sup> Wheaton, *Hist. Law of Nations*, pp. 282-4, 552.

<sup>2</sup> Martens, *Nouveau Recueil*, tome ix. p. 252; Ortolan, *Domaine International*, § 44.



nions of Holland, was entirely *artificial*; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at great expense. The emperor Joseph II., in 1781, attempted to open the navigation of this river, and for this purpose, in 1784, brought forward several antiquated claims against the republic. A compromise was effected by the treaty of Fontainebleau, in 1785, by which it was agreed that the river Scheldt, from Saftingen to the sea, should continue to be shut on the side of the States General, as well as the canals of Sas, Swin, and the other mouths of the sea there terminating, conformably to the treaty of Munster. In return for these concessions, the Dutch accorded several of the emperor's demands, and agreed to pay an indemnity of ten millions of florins. The claim of Holland in this discussion was defended by Mirabeau, on the ground of positive conventional law. He was not absolutely opposed to the free navigation of the Scheldt, but, on the contrary, endeavoured to show how it might be opened without danger to Holland and Europe, by the independence of Belgium, which would form a neutral barrier to the United Provinces. The free navigation of this river was again seriously discussed in 1792-3, in the diplomatic correspondence between Holland, Belgium, England and France; and the question finally settled, as before stated, by the congress of Vienna, in 1815, on the basis of the celebrated memoir presented by Baron Wilhelm Von Humboldt.<sup>1</sup>

§ 32. By the treaty of 1763, between France, Spain, and Great Britain, the boundary between the French and British possessions in North America was the middle of the river Mississippi, from its source to the Iberville, and thence, through that river and lakes Maurepas and Pontchartrain, to the sea. The right of freely navigating the Mississippi, from its source to the sea, was, at the same time, secured to the subjects of Great Britain. Both Louisiana and Florida were afterwards ceded to Spain by France and Great Britain. By the independence of the United States, its citizens had acquired the same rights, with respect to the navigation of the Mississippi, as had belonged to the subjects of Great Britain. But Spain, having become possessed of both banks of that river, from

<sup>1</sup> Martens, *Rec. de Traité*s, tome xxx. p. 209; Mayer, *Corpus Juris Germ.*, tome ii. pp. 224-239, 298; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 57; lib. ii. ch. xxviii.

its mouth to a considerable distance above, claimed its exclusive navigation below the southern boundary of the United States. This claim was contested by the United States, as contrary to the treaty of 1763, as well as in violation of the law of nature and of nations. The dispute was terminated by the treaty of San Lorenzo el Real, in 1795, by which the free navigation of the Mississippi was secured to the citizens of the United States, in its whole breadth, from its source to the ocean. By the subsequent acquisition of Louisiana and Florida by the United States, the whole river, from its source to the Gulf of Mexico, was included within their territory, and, consequently, to them belonged the exclusive right of its navigation.<sup>1</sup>

§ 33. The relative position of the United States and Great Britain, says Mr. Wheaton, in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary strikes that river, and Great Britain of the northern shores of the lakes and of the river to the same point and of both banks of the river, from the latitude forty-five degrees north to the sea. The United States claimed the right to navigate the St. Lawrence, to and from the sea, as one to which they were entitled by the laws of nations. In addition to the arguments used in support of their right, in 1795, to the free navigation of the Mississippi, when Spain possessed both banks of that river near its mouth, the United States fortified their claim by the consideration that this navigation was, before the war of the American revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies in the war of 1756; and that their claim to the free navigation of the St. Lawrence was precisely of the same nature with that of Great Britain to the navigation of the Mississippi, recognised in 1763, when the mouth and lower shores of that river were held by another power.

The arguments of the British Government against this

<sup>1</sup> Wheaton, *Hist. Law of Nations*, pp. 506 et seq.; Waite, *State Papers*, vol. x. pp. 135-140.



claim were by no means satisfactory to the United States, and do not seem well founded upon the principles of international law. The discussion at the time, 1826, led to no other result than to present the subject to the more deliberate consideration of the two nations. The question, however, was satisfactorily arranged by the commercial treaty of the 5th of June, 1854, between the two countries, the fourth article of which provides, that the citizens and inhabitants of the United States shall have the right to navigate the river St. Lawrence and the canals of Canada, used as the means of communicating between the great lakes and the Atlantic Ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of her Britannic Majesty, subject only to the same tolls and other assessments as now are, or may hereafter be, exacted of her Majesty's said subjects; it being understood, however, that the British Government retains the right of suspending this privilege, on giving due notice thereof to the Government of the United States.<sup>1</sup>

<sup>1</sup> Wheaton, *Hist. Law of Nations*, pp. 511 et seq.; Phillimore, *On Int. Law*, vol. i. § 170; *Congress. Docs.* 1827-1828, No. 43; Hansard, *Parl. Deb.*, vol. cxxvii. No. 6, pp. 1073-4.

A difference of opinion having for many years existed between Great Britain and the United States, as to the meaning of the words 'the middle of the Channel,' in the Treaty of Washington of June 15, 1846, it was agreed by the Treaty of Washington of May 8, 1871, to refer the difference to the arbitration of the Emperor of Germany.

The Treaty of Ghent had made the parallel of 49° N., the boundary line between the two countries as far as the Pacific. Opposite the sea termination of this line lay Vancouver Island, recognised as a British possession. At the date of the first treaty of Washington, the portion of North-Western America adjacent to the line was altogether uninhabited by settled colonists, but as far as British dominion extended it was held under a terminable lease by the Hudson's Bay Company, and used only by hunters and fishermen under its control in common with numerous tribes of Indians. The treaty provided that the line of the 49° parallel 'should be continued to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel and of Fuca Straits to the Pacific Ocean.' In the middle of this channel lay the Island of San Juan, together with several smaller islets. Both countries contended for this island. The question referred to the Emperor was whether this channel should be run, as claimed by the Government of Her Britannic Majesty, through the Rosario Straits, or through the Canal of Haro, as claimed by the Government of the United States.

The Emperor gave his award in favour of the United States, Oct. 21, 1872. But there is reason to believe that, had the fact of an existing third and middle channel dividing the group of islands been made part of the question, the Emperor would have selected the middle channel. As the matter was placed before him, he had no option save to select the Rosario or the Haro channel.



## CHAPTER VII.

## RIGHTS OF LEGISLATION AND JURISDICTION.

1. Exclusive power of civil and criminal legislation—2. Law of real property—3. Law of personal property—4. Law of contracts—5. Exceptions to rule of comity in contracts—6. Rule of judicial proceeding—7. Law of personal capacity and duty—8. Droit d'aubaine and droit de rétraction—9. Law of escheat—10. Foreign marriages—11. Foreign divorces—12. Laws of trade and navigation—13. Laws of bankruptcy—14. Law of treason and other crimes—15. Judicial power of a State—16. Jurisdiction with respect to actions—17. Jurisdiction of a State over its own citizens—18. Over alien residents—19. Over real property—20. Over personal property—21. Rule of decision in case of personal property—22. Distinction between contracts *inter vivos* and *causâ mortis*—23. Between assignments in bankruptcy and voluntary assignments—24. Jurisdiction over public and private vessels on the high seas—25. Public armed vessels and their prizes in foreign ports—26. Private vessels in foreign ports—27. Summary of the judicial powers of a State—28. Extradition of criminals—29. Extra-territorial operation of a criminal sentence—30. Conclusiveness of foreign judgments in personal actions—31. Conclusiveness of foreign judgments *in rem*—32. Foreign courts, how far exclusive judges of their own jurisdiction—33. Proof of foreign laws—34. Proof of foreign contracts and instruments—35. Of foreign judgments and documentary evidence.

§ 1. WE have already remarked that the exclusive power of civil and criminal legislation, is one of the essential rights of every independent and sovereign State. An infringement upon this right is a limitation of the natural sovereignty of the State, and if extended to a general denial of this power, it is justly considered as depriving the State of one of its most essential attributes, and as reducing it to the position of dependence upon the will of another. In such a case, it can no longer claim to be numbered among independent and sovereign States, for it no longer possesses the attributes necessary to entitle it to rank as such among the nations of the world, viz.: *the right to exercise its volition*, and the capacity to contract obligations.<sup>1</sup>

§ 2. This sovereign right of legislation extends (with the

<sup>1</sup> See *ante*, ch. iii. § 1, and ch. iv. § 14.

exceptions hereafter to be mentioned) to the regulation of all real or immovable property within the territorial limits of the State, no matter by what title such property may be held, or whether it belongs to aliens or to citizens of the State. The law of the place, where real or immovable property is situate, or the *lex loci rei sitæ*, governs in everything relating to the tenure, title, and transfer of such property. Hence it is that the descent, device, or conveyance of real property, in a foreign country, must be governed by, and executed according to, the local laws of the State where such property is situate. And where these local laws prescribe, as to instruments for the transfer of real property, particular forms which can only be observed in the place where it is situated, such as the registry of a deed, or the probate of a will, the transfer cannot be executed in a foreign country. But, by the rules of international jurisprudence, recognised among the different nations of the European Continent, if the property is allowed, by the *lex loci rei sitæ*, to be alienated by deed or will, and the local laws do not require forms which must necessarily be observed in the place where it is situated, the deed or will may be executed according to the law of the place where it is made. But the application of the rule is less liberal in the United States and Great Britain, the formalities required by the laws of the State where the land lies being essential to the validity of the transfer.<sup>1</sup>

§ 3. With respect to personal or movable property, the same rule generally prevails, except that the law of the place where the person to whom it belonged was domiciled at the time of his decease, governs the succession, *ab intestato*, to his personal effects. So, also, the law of the place where any instrument relating to personal property is executed, by a person domiciled in that place, governs, as to the form, execution and interpretation of the instrument. Thus, the validity, effect and interpretation of a testament of personal property, must be determined by the law of the place where it is made, and where the party making it is domiciled. *Lex loci*

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 3; Story, *Conflict of Laws*, §§ 364-373, 428-483; Robinson v. Campbell, 3 Wheat. R., 217; United States v. Crosby, 7 Cranch. R., 115; Coppin v. Coppin, 2 P. W. R., 291; Brodie v. Barry, 2 Ves. and Be. R., 127; Dundas v. Dundas, 2 Dow. and Cl. R., 349; Johnson v. Tilford, 1 Russ. and My. R., 244.



*domicilii regit actum.* The rule is applicable to every transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or *causâ mortis*, and it is founded on the maxim that personal property has no locality, but adheres to the person of its owner. *Mobilia sequuntur personam.* There are exceptions to this rule: *first*, in cases where the local or customary law of the place gives to the particular property a necessarily implied locality; and *second*, in special cases provided for by local statutes. Thus, by the laws of some countries, certain movables are considered as annexed to immovables, either by incorporation, or as incidents, and therefore partake of the character of the latter, such as fixtures of personal property in houses, under the English common law. Heritable bonds, ground rents, and other rents on land are ranked, by the Scottish law, among the class of immovables. Contracts respecting public funds, or stocks, may be required to be carried into execution, according to the local law; and the same rule may properly apply to the transfer of shares in bank, insurance, canal, railroad, and other companies which owe their existence to, and are regulated by, peculiar local laws. Subject to these, and perhaps some other exceptions, the general rule is that a transfer of personal property, good by the law of the owner's domicile, is valid wherever it may be situate.<sup>1</sup>

§ 4. The general law of contracts is, that the validity of every contract is to be decided by the law of the place where it is made, or, in legal phraseology, the *lex loci contractus* is to govern in everything respecting the form, interpretation, obligation, and effect of the contract. 'The rule,' says Story, 'is founded, not merely in the convenience, but in the necessities of nations; for, otherwise, it would be impracticable for them to carry on an extensive intercourse with

<sup>1</sup> Huberus, *Praelect.*, lib. i. tit. iii. §§ 14, 15; Foelix, *Droit Int. Privé*, § 37; U. S. v. Bank of U. S. 8 Rob. R., 262; Black v. Zacharie, 3 Howard R., 483; Sill v. Worswick, 1 H. Bl. R. 690. Plaintiff was holder of Peruvian Government bonds, pledging specially the proceeds of sale of guano: defendants as agents of the Government received part of the guano. It was held by the English Court of Appeal that it possessed no jurisdiction to enforce the bonds, or to attach proceeds of sale of the guano, and that the defendants as agents of a foreign Government could not be sued in the absence of their principals.—Twycross v. Dreyfus, 46 L. J., Ch. 510. Service upon a superintendent in Jamaica of a company domiciled in England is good service on the company.—Royal Mail Steam Packet Co. v. Braham, 46 L. J., Ch. 67.

each other. The whole system of agencies, purchases and sales, credits, and negotiable instruments, rests on this foundation; and the nation which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state like that in which it now exists with savage tribes.' 'In this, as a general principle, there seems a universal consent of courts and jurists, foreign and domestic. The same rule applies, *vice versâ*, to the invalidity of contracts; if void or illegal by the law of the place of the contract, they are generally held void and illegal everywhere.'

We have already mentioned exceptions to this rule, in the transfer of real property, which is governed by the *lex loci rei sitæ*, and in the transfer of immovable property, which, though generally governed by the *lex domicilii*, is, in some cases, subject to the same rule as real property. The *lex loci contractûs* cannot apply to the personal *status* and capacity of the citizens of a State, or to cases where it would conflict with the laws of another State in respect to its police, its health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens. 'These exceptions,' says Story, 'result from the consideration that the authority of the acts and contracts done in other States, are not *proprio vigore*, of any efficacy beyond the territories of that State, and whatever is attributed to them elsewhere, is from comity and not of strict right; and every independent community will, and ought to, judge for itself how far that comity ought to extend. The reasonable limitation is, that it shall not suffer prejudice by its comity. Mr. Justice Best has, with great force, said, that, in cases turning upon the comity of nations, (*comitas inter communitates*,) it is a maxim, that the comity cannot prevail in cases where it violates the law of our own country, the law of nature, or the law of God. Contracts, therefore, which are in evasion or fraud of the laws of a country, or the rights or duties of its subjects, contracts against good morals, or religion, or public rights, and contracts opposed to the national policy or institutions, are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made.'<sup>1</sup>

<sup>1</sup> Kent, *Com. on Am. Law*, vol. ii. pp. 454, 455; Bouhier, *Les Cou-*



§ 5. But, with regard to these exceptions to the rule of international comity as applicable to contracts of personal property, it must be remembered that the rule is based, not on the conformity, but on the repugnancy of the laws of different States. When, therefore, it is said that contracts opposed to the national policy and institutions of a State, or to good morals, are excepted from the general rule of comity, it is not meant that all contracts unauthorised by or opposed to the *laws* of a State, are thus excepted. Comity is the general rule, and the exceptions are strictly limited so as not to affect the principle which is recognised and established by the rule. Thus, it is held in Massachusetts, that a contract for the sale and delivery of slaves in a foreign State where such sale is not prohibited, may be sued in another State where slaves cannot be imported. But if the delivery was to be in a State where the importation was interdicted, the contract could not be sued on in the interdicting State, 'because the giving of legal effect to such a contract would be repugnant to its rights and interests.' So of contracts opposed to good morals, 'Marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State, a marriage between a man and his deceased wife's sister is lawful, but it is not in some States. Such a marriage celebrated here, would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract.' But 'if a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here.' 'In an action on a contract made in a foreign State by a prostitute, to recover the wages of her prostitution: this contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And, perhaps, all cases may be considered as within this exception, which are founded on moral turpitude,

*tunes*, etc., ch. xxi. § 190; *Forbes v. Cochrane*, 2 *B. and Cres. R.*, 448-471; *Massé, Droit Commercial*, tome ii. §§ 77 et seq.; *Riquelme, Derecho Pub. Int.*, lib. ii. tit. i. cap. iv.; *Gardner, Institutes*, pp. 122 et seq.

in respect either of the consideration or the stipulation.' It is thus seen that these exceptions, with respect to national policy and good morals, must, in the first case, be limited to contracts the execution of which would be repugnant to its interests and rights of sovereignty; and, in the second case, those which are founded on moral turpitude, in respect either of the consideration or the stipulation. So, when it is said that the rule of comity does not apply to contracts made in evasion or fraud of the laws of a country, or of the rights and duties of its subjects, it is not meant that all contracts made in conformity with laws of the place of the contract, but which would have been void if made in the place of the forum as being prohibited by its laws, are excepted from that rule. Thus, in *certain cases* where the law of a State prohibits particular kinds of voluntary assignments for the benefit of creditors, it has been held that those made in foreign States, and which come within the prohibition, although valid by the law of the place where made, will not be sustained in the forum of the State so prohibiting them. But the exception in those cases is not made on the ground of repugnancy in the laws of the two places, for that would, as has already been shown, make the exception the general rule, and destroy the very foundation of the law of international comity. The exception, with respect to personal property, when made, has been based on the fact that the foreign assignment was injurious to the rights and interests of *citizens* of the *prohibiting State*, and it has been limited to *property within its jurisdiction* at the time of the assignment, and held by the law as *pledged* for the payment of debts due *within* the State.<sup>1</sup>

§ 6. But while the law of the place where the contract is made must determine the obligation of the contract, the law of the place where the suit is pending must regulate the remedy, or manner of proceeding, to enforce the obligation. Thus, if a contract made in one country is attempted to be

<sup>1</sup> Westlake, *Private Int. Law*, ch. vi.; Story, *Conflict of Laws*, §§ 245, 248; Burrill, *On Assignments*, p. 336; *Greenwood v. Curtis*, 6 Mass. R., 378; *Zipcey v. Thompson*, 1 Gray R., 243; *Ingraham v. Geyer*, 13 Mass. R. 147; *Varnum v. Camp*, 1 Green R. 326; *Thuret v. Jenkins*, 7 Martin R., 353; *Richardson v. Leavitt*, 1 Lou. Ann. p. 430; *Whitenwright v. Leavitt*, 4 Lou. Ann., p. 252; *U. S. v. Bank of U. S.*, 8 Rob. R., 262; *Black v. Zacharie*, 3 Haw. R., 483; *Forbes v. Scannel*, 13 Cal. R., 242.



enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, and the rules of evidence, to limitation or prescription, and to the execution of judgments, is to be determined solely and exclusively by the law of the State where the proceeding is pending. In general terms, it may be stated that the obligations of a contract are to be determined by the *lex domicilii* or *lex loci contractus*, and the proceeding or remedy for enforcing it by the *lex fori*. 'The reasons for this doctrine,' says Justice Story, 'are so obvious, that they scarcely require any illustration. The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such a course of proceeding as best comports with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights and guard against wrongs, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, customary and positive, of one nation, for rights which it recognised, or for duties which it enforced, might be wholly unfit for that of another nation, either as having gross defects, or steering wide of the appropriate remedial justice.' . . . . . 'All that a nation can, therefore, be justly required to do is to open its own tribunals to foreigners, in the same manner and to the same extent as they are open to its own subjects, and to give them the redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code for natives and residents.'<sup>1</sup>

§ 7. The right of municipal legislation of a sovereign State extends to everything affecting the State and capacity of its own subjects, with respect to their personal rights within its own territory, and also, with certain exceptions, to the regulation of the conduct of all persons within its jurisdiction, whether subjects or foreigners. Moreover, these municipal laws, in some cases, operate beyond its territorial jurisdiction, with respect to the condition and personal capacity of its citizens, when resident in a foreign country; such

<sup>1</sup> Boullenois, *Traité des Lois*, etc., tome ii. p. 462; Robinson v. Bland, 2 Burr. R., 1084; Fenwick v. Sears, 1 Cranch. R., 259.

as the qualities of citizenship, legitimacy and illegitimacy, minority and majority, idiocy, lunacy, marriage and divorce. The laws of a State, with respect to these qualities or capacities of its subjects, travel with them wherever they go, and attach to them in whatever country they are resident. But it must be observed that the municipal laws of one State cannot interfere with any rights its subjects may acquire, or privileges they may enjoy, under the laws of another State, while they are resident in such foreign State, and without the jurisdiction of their own country. The same rule applies to personal duties and obligations. A citizen of one country, naturalised or domiciled in another State, enjoys the rights and privileges given him by the State where he is so naturalised or domiciled. The laws of his native country cannot affect him personally, so long as he is without its jurisdiction. But if he return to his native country, and place himself within its jurisdiction, it has usually been held that he becomes not only subject to its laws generally, but also to the duties and obligations of his primitive allegiance. But this question will be more particularly considered in the chapter on national character.<sup>1</sup>

§ 8. In the darkness of the middle ages, the rule called *jur albinatus*, or *droit d'aubaine*, was established, by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the deceased. But the progress of civilisation has almost entirely abolished this barbarous and inhospitable usage. Judge Story expresses a doubt if it is now recognised by any of the civilised nations of the earth. The analogous usage of the *jus detractus* or *droit de rétraction*, by which a tax was levied upon the removal from one State to another of property acquired by succession or device, has also been reciprocally abolished in most civilised countries.<sup>2</sup>

§ 9. The rules of international and municipal law, with respect to foreigners holding real estate, are less liberal and

<sup>1</sup> Martens, *Précis du Droit des Gens*, §§ 92 et seq.; Bello, *Deracke Internacional*, pt. i. cap. iv. §§ 3-5; Westlake, *Private International Law*, ch. xiii.

<sup>2</sup> Mayer, *Corp. Jur. Germ.*, tome ii. p. 17; Merlin, *verb.* 'aubaine'; Martens, *Précis du Droit des Gens*, § 90; Massé, *Droit Commercial* tome ii. §§ 8-14; Bacquet, *Droit d'Aubaine*, chs. ii. et seq.; Cushing *Opinions of U. S. Att'ys. Genl.*, vol. viii. p. 411.



just than with respect to their personal property. It seems to be the universal rule of civilised society that when the owner of property dies intestate and leaves no heirs, it should vest in the public, and be at the disposal of the Government. Where, therefore, the deceased leaves no heirs capable of succeeding to his estate, it vests in the State. According to the English law, *escheat* denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency, in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee. But where there are no feudal tenures, and no private person to succeed to the inheritance by escheat, the State steps in, in the place of the feudal lord, by virtue of its sovereignty, as the presumed original proprietor of all the lands within its jurisdiction. The principle is certainly a just one, that, if the ownership of property becomes vacant, the right should subside into the whole community, in whom it was supposed to be originally vested, when society first assumed the elements of order and subordination. But the rules of English law, with respect to the rights of alien heirs to inherit property, are so unjust and illiberal in their nature and effects, that they have been modified and limited in most of the States of the American Union, by decisions of courts and statutory dispositions. The American Union, as such, has no law of succession, of inheritance, of descent, of filiation, or of tenure of land, whether in the case of citizens of the United States or of foreigners. Relationship, inheritance, testaments, successions, tenure of estates, real and personal, all these are questions of the local law of the individual States. But in their treaties with foreign countries, the United States have stipulated against the application of the right of escheat, or the *droit d'aubaine*, to aliens claiming real estate by descent in the United States, and that the descent should be the same as if such foreigner were not disqualified by alienage. Such treaties are in accordance with the more liberal spirit of the age, and with the present condition of public law in Europe. But it has been contended by some that the Federal Government has no power, under the Constitution, to abrogate by treaty an incompatible law of either of the States, and that the State laws must control, in such matters, notwithstanding the provisions of treaties. But the weight of authority is

opposed to this view, and the courts have generally held that such stipulations of treaties are within the constitutional powers of the Union.<sup>1</sup>

§ 10. By the laws of some countries, marriage is considered in no other light than as a civil contract, while in others it becomes a religious as well as a natural or civil contract; 'for it is a great mistake,' says Story, 'to suppose that because it is the one, therefore it may not likewise be the other.' Marriage is a personal consensual contract, but is a contract *sui generis*, and differs from other contracts in this, that the rights and obligations, or duties arising from it, are not left entirely to be regulated by the agreement of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will: and, unlike other contracts, it cannot, in general, be dissolved by mutual consent. It is, therefore, evident that the rules of law applicable to other contracts cannot always be resorted to in expounding and enforcing the marriage contract. It may, however, be laid down as a general principle, that so far as marriage is a consensual personal contract, its validity must be determined according to the *lex loci*; if valid in the place where it is celebrated, it is valid everywhere, and if invalid there, it is equally invalid everywhere. But there are certain exceptions to this rule, the most prominent of which are those of polygamy and incest (which are prohibited by the laws of every civilized country), and to these some writers add those marriages made by a fraudulent evasion of the laws of the State to which the parties belong. With respect to the rights, duties, and obligations arising from the marriage relation, we must, in many cases, look to the law of the domicile. It is, therefore, obvious that the rules of international jurisprudence, with respect to this contract, are somewhat variable, according to the peculiar circumstances of each

<sup>1</sup> Bouvier, *Law Dictionary*, verb 'escheat'; Kent, *Com. on Am. Law*, vol. iv. p. 420; Blackstone, *Commentaries*, vol. ii. p. 244; *Fairfax's Lessee v. Hunter's Lessee*, 7 *Cranch. R.* 627; *Ware v. Hilton*, 3 *Dall. R.* 242; *Chirac v. Chirac*, 2 *Wheat. R.* 259; *Orr v. Hodgson*, 4 *Wheat. R.* 453; the 'Society,' etc. *v. New Haven*, 8 *Wheat. R.* 464; *Hughes v. Edwards*, 9 *Wheat. R.* 489; *Banks v. Carneal*, 10 *Wheat. R.* 181; *Hens v. Dupont*, 3 *Peters R.* 242; the *People v. Gerke*, 5 *Cal. R.* 381; *Treaty with France*, 1778; *Convention with France*, 1800; *Treaty with Netherlands*, 1782; *Treaty with Prussia*, 1828; *Jefferson, Works*, vol. iii. p. 365.



case. Moreover, on some questions arising out of this relation, no rule can be said to be yet established, there being a direct conflict in the judicial decisions of different States, and in the opinions of the most eminent of text-writers. After a full survey of the writings and cases, foreign and domestic, on this subject, Story lays down the following general rules as the result of his examination: 1. Where there is a marriage in a foreign country, and an express nuptial contract with respect to personal property, it will be sustained everywhere, unless it contravenes some positive rule of law or policy; but, as to real property, it will be made subservient to the *lex rei sitæ*. 2. Where such a contract applies to personal property, and there is afterward a change of matrimonial domicile, the law of actual domicile will govern as to future acquisitions. 3. If there be no such nuptial contract, the matrimonial domicile governs all the personal property everywhere, but not the real property. 4. The matrimonial domicile governs as to all acquisitions, present and future, if there be no change of domicile. If there be, then the law of the actual domicile will govern as to future acquisitions, and the law *rei sitæ*, as to real property.<sup>1</sup>

<sup>1</sup> Huberus, lib. i. tit. iii. § 9, considers marriages invalid which are an evasion or fraud upon the law of the country to which the parties belong, and in which they are domiciled. See also Pothier, *Traité du Mariage*, n. 263. But such marriages have been held good in England and America, (*Compton v. Bearcroft*, commented on in *Scrimshire v. Scrimshire*, 2 *Hagg. Consist. R.* 443; *Medway v. Needham*, 16 *Mass. R.* 157; *Putnam v. Putnam*, 8 *Pick. R.* 433). See *West Cambridge v. Lexington* (1 *Pick. R.* 596) as to the legitimacy of the issue of a person divorced *a vinculo*, and declared incapable of marrying again, but who had gone into a neighbouring State and contracted a new marriage.

Two Portuguese cousins contracted in London, marriage, illegal by the law of Portugal on the ground of consanguinity, and returned to Portugal and continued to reside there; they never cohabited. Sir Robert Phillimore dismissed the petition for nullity of marriage for illegality, on the ground that if this important question were not embarrassed by precedents of former decisions, and especially by the judgment on *Simonin v. Mallac*, (2 *Sw. & Fr.* 67; 29 *L. J. P. M. & A.* 97), he might have been inclined to hold that the *jus gentium* would require the *lex fori*, which is also the *lex loci contractûs*, to adopt for the occasion as its own law the *lex domicilii*, as in an analogous case, that of *Dalrymple v. Dalrymple*, 2 *Hagg. Cons.* 54, and Lord Stowell speaks of the law of England, withdrawing altogether and leaving the legal question to the exclusive judgment of the law of the foreign country. But Sir R. declined, considering the decisions on this subject (he sitting as a single judge), to pronounce the marriage contracted in England and valid by English law, to be null.—*Sottomayor v. De Barros*, 46 *L. J. (P. D. A.)* 43. The Court of Appeal, on Nov. 26, 1877, reversed this judgment, and declared the nullity of the marriage, determining that if the parties had been English subjects,

§ 11. The same remarks will apply to international jurisprudence on the subject of divorce, or the dissolution of the matrimonial state, and a release of the contracting parties from all future obligation. 'It is deemed by all modern nations to be within the competency of legislation,' says Story, 'to provide for such a dissolution and release in some form, and for some cause. And there is no doubt that a divorce, regularly obtained, according to the jurisprudence of the country where the marriage was celebrated, and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every other country. I say, where the marriage is celebrated, and where the parties are domi-

domiciled in England, the marriage would undoubtedly have been valid, but it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It had been urged that this did not apply to the contract of marriage, and that a marriage valid according to the law of the country where it was solemnised was valid everywhere. The Court, however, held that the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; and further that, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where the law prevails, and renders invalid a marriage between persons, both being at the time of their marriage, subjects of and domiciled in the country which imposes the restriction, wherever such marriage may have been solemnised. In the argument, several passages from Story's *Conflict of Laws* were referred to in support of the contention, that in an English Court a marriage between persons who by that law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. The Court deemed that it is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous, and that probably the true explanation of the passages in Story is given in *Brook v. Brook*, (9 H. L. C. 227), by Lord Cranworth, and by Lord Wensleydale, at pp. 241-2, that Story is referring to marriages not prohibited or declared to be invalid by the Municipal Law of the country of domicile; it was said that the impediment imposed by the law of Portugal could be removed by a Papal dispensation, and, therefore, that it could not be said that there is a personal incapacity of the petitioner and respondent to contract marriage. But the evidence was clear that, by the law of Portugal, the impediment to the marriage between the parties is such, that in the absence of a Papal dispensation the marriage would be by the law of that country void as incestuous. The Statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does



ciled, for both ingredients are, or may be, material, and the presence of one and the absence of the other may change the legal predicament of the case. The real difficulty is to lay down appropriate principles to govern cases where the marriage is celebrated in one case, and the parties are domiciled in another; where there is a change of domicile by one party, without a similar change by the other; where, by the law of the place of celebration, the marriage is indissoluble, or dissoluble only under peculiar circumstances, and by the law of another it is dissoluble for various causes, and even at the pleasure of the parties.' On this subject there is some conflict of authorities, but it is not our intention to examine these discussions.<sup>1</sup>

recognise the validity of such a dispensation, and in the opinion of the Court it could not be held, that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It was proved that the Courts of Portugal, where the petitioner and respondent were domiciled and resident, would have held the marriage void, as solemnised between parties incapable of marrying, and incestuous; therefore, how could the Courts of Great Britain hold the contrary, and, if appealed to, say the marriage is valid? It was pressed in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. The opinion of the Court on this appeal was confined to the case when both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle, the Court explained, would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country; that if *Brook v. Brook* had been a decision on the question arising on this petition, it would have been sufficient without more to refer to it as decisive; but the judgment in that case only decided that the English Courts must hold invalid a marriage between two English subjects domiciled in England who were prohibited from intermarrying by an English Statute, even though the marriage was solemnised during a temporary sojourn in a foreign country; that the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based; that in the case of *Simonin v. Mallac*, the objection to the validity of the marriage, which was solemnised in England, was the want of the consent of parents required by the law of France; that this consent must be considered a part of the ceremony of marriage, and not a matter affecting the present capacity of the parties to contract marriage; and that that decision did not govern the present case.

<sup>1</sup> *Story, Conflict of Laws*, §§ 108-230; *Kent, Com. on Am. Law*,

§ 12. The laws of trade and navigation of a State are binding upon its citizens wherever they may be, but they cannot affect foreigners beyond its territorial limits. Thus, offences against the laws of a State, regulating or prohibiting any particular trade, if committed by foreigners within the territorial jurisdiction of another State, are not punishable by the tribunals of the State whose laws they have violated; but if committed by its citizens, they are so punishable, no matter where committed, whether within its own limits, on the high seas, or in a foreign country. A distinction, however, must be made between mere commercial regulations permitting or prohibiting a certain trade, and statutes creating a criminal offence, with personal penalties expressly applicable to all the citizens of the State. The commercial domicile of a party may sometimes exempt him from the operation of the laws of trade of his own country, but whilst his former allegiance continues he is liable to incur the penalties of a criminal offence against his own country, which penalties may be enforced whenever he comes within the reach of its municipal laws.<sup>1</sup>

§ 13. It is laid down as a general principle of international jurisprudence, that a discharge of a contract by the law of the place where it is made, is a discharge everywhere, no matter whether made between a citizen and a foreigner, or between foreigners. But in the application of this rule it is necessary to distinguish between cases where, by the *lex loci*, there is a

vol. ii. p. 62; Ferguson, *On Marriage and Divorce*, vol. i. § 18; Erskine, *Institutes*, b. i. tit. vi. §§ 38, 43; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 7; Connelly v. Connelly, 2 *Law and Eq. R.* 570; Dorsey v. Dorsey, 1 *Chand's Law Reporter*, 287; Bowyer, *Universal Public Law*, ch. xvi; Gardner, *Institutes*, pp. 201 et seq.

The Court of Paris admits the right, for a stranger divorced in conformity with the law of his own country, to contract a new marriage in France, even with a French subject. (See Dalloz, *Code Civil annoté*, art. iii., Nos. 104 et seq. and *Conf. Aubry et Rau, Droit civil franç.*, 4 edit., t. i. § 31, p. 98).

A foreign lady divorced in conformity with the law which forms her personal status cannot contract, in France, a new marriage until ten months after the divorce, even although the law (*personelle*) permits her to do so earlier; *Cour de Paris*, 13 February 1873, 1<sup>re</sup> *Chr.*, Gilardin, 1<sup>er</sup> *Pres.*, *Aubépin Att. Gen.*

Leibnitz relates (pp. 154-56) that the Emperor Lewis of Bavaria claimed in 1341 the sole right of granting dispensations and of judging of the validity of marriages in his empire, and disputed ecclesiastical interference in such matters on the ground that they were merely the subject of human law.

<sup>1</sup> Foelix, *Droit Int. Privé*, §§ 510-532; *American Jurist*, vol. xxii. pp. 381-386; Massé, *Droit Commercial*, tome ii. §§ 38, 376 et seq.; Bello, *Derecho Internacional*, pt. i. cap. iv. §§ 5, 6.



virtual or direct extinguishment of the debt itself, and where there is only a partial extinguishment of the remedy. By the *bankrupt* and insolvent laws of some States there is an absolute discharge from all rights and remedies of the creditors, while in other States these laws fall far short of this extent and operation, neither the obligation nor the remedy being entirely extinguished. So far as the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other State having the exclusive right of regulating the proceedings of its own courts of justice. But where the examination, instead of being merely contingent upon the failure to perform the obligation, through insolvency, enters into and forms an essential ingredient of the original contract itself, by the law of the country where it is made, it cannot be enforced in any other State by the prohibited means. This has led to various refinements and distinctions in the application of the principles of international jurisprudence to the law of bankruptcy, which it is not our object to discuss.<sup>1</sup>

§ 14. It is a general rule of law that crimes are altogether local, and cognisable and punishable exclusively in the country here they are committed. No other nation, therefore, has any right to punish them, or is under any obligation to take notice of or to enforce any judgment rendered in such cases in the tribunals of another State. Hence, criminal laws may be applied to foreigners and all persons resident within the territory, for all such persons owe a temporary allegiance to the State where they reside. But although a State takes no cognisance of offences committed beyond its limits and against the laws of another country, it nevertheless can punish the crimes of its own citizens under its own laws, if within their

<sup>1</sup> Lord Stair's *Institutions*, vol. i. p. 4, note, ed. 1832; Rose, *Cases in Bankruptcy*, vol. i. p. 462; Kent, *Com. on Am. Law*, vol. ii. p. 393; *Harrison v. Sterry*, 5 *Cranch. R.* 289; *Ogden v. Saunders*, 11 *Wheat. R.* 153; *Sturges v. Crowninshield*, 4 *Wheat. R.* 122; *McMillan v. McNeil*, 1 *Wheat. R.* 209; *Le Roy v. Crowninshield*, 2 *Mason R.* 161; *Pugh v. Russell*, 2 *Blackford R.* 391; *Van Raugh v. Van Arsdale*, 3 *Carné's R.* 154; *Woodhull v. Wagner*, 1 *Baldwin R.* 296; *Van Hook v. Whitlock*, 26 *Wendell R.* 43; *Phillips v. Allen*, 8 *Barn. and Cres. R.* 477; *Lewis v. Owen*, 4 *Barn. and Ald. R.* 654; *Le Chevalier v. Lynch*, 1 *Doug. R.* 170; *Sill v. Warwick*, 1 *H. Blackstone R.* 639; *Quinn v. Keefe*, 2 *H. Blackstone R.* 553; *Smith v. Buchanan*, 1 *East R.* 6; *Potter v. Brown*, 5 *East R.* 124; *Westlake, Private Int. Law*, ch. vii.

reach, no matter where the crime may have been committed. Thus, the laws of treason are binding upon the subjects of a State no matter where the treasonable act is done, for their allegiance, until changed, is considered as travelling with them wherever they may go.<sup>1</sup>

§ 15. It may be stated, in general terms, that the judicial power of a State is coextensive with its legislative power, and is independent of every other State. The general position, however, must be qualified by the exceptions to its application arising out of express compacts with others, by which it may part with certain portions of its sovereign rights or modify the exercise of its powers as a sovereign and independent State. It must be noticed also that its judicial power does not embrace those cases in which the municipal claims of another nation operate within its territory, such as the cases of foreign ministers, or of a fleet or army coming within its territorial limits, by its permission, either express or implied. It has already been stated that the maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State, and that the general usage of nations has superadded the extent of one marine league, or the range of a cannon shot, along all its shores or coasts. Within these limits its right of territorial jurisdiction is absolute, and excludes that of every other nation. Beyond these limits it may also exercise jurisdiction for certain special purposes, as the execution and enforcement of its revenue laws, etc., and over its own public and private vessels on the high seas, and its public, and to a certain extent, its private vessels in foreign ports.<sup>2</sup>

§ 16. Continental jurists generally agree that, properly speaking, there are three places of jurisdiction: first, the *forum domicilii* or place of domicile of the party defendant; second, the *forum rei sitæ*, or the place where the thing in controversy is situate; and third, the *forum contractus*, or *forum rei gestæ*, or the place where the contract is made or the act is done. These distinctions in jurisdiction result from the distinctions of the Roman civil law which have been introduced

<sup>1</sup> *American Jurist*, vol. xxii. pp. 381-386.

<sup>2</sup> Webster, *Dip. and Off. Papers*, pp. 140 et seq.; 'Le Louis,' 2 *Dod. R.* 245; *Church v. Hubbard*, 2 *Cranck. R.* 234; and see notes to ch. vi. § 13.



into the jurisprudence of most of the continental nations of modern Europe. In the corresponding distribution of actions by the English common law in personal, real, and mixed actions, the former are generally capable of being brought wherever the party can be found, while the jurisdiction of the latter are confined to the place *rei sitæ*; in other words, personal actions are *transitory*, while real and mixed actions are *local*. Considered in an international point of view, either the thing or the person made the subject of the jurisdiction, must be within the territory, for no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its judicial decisions; and every exertion of authority of this sort, beyond its limits, is a mere nullity, and incapable of binding such persons or property in any other tribunals.<sup>1</sup>

§ 17. In regard to the citizens (native or naturalised) of a State, while within its territory, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled, and ought everywhere to be respected. In regard to citizens domiciled abroad, nations generally assert a claim to regulate the rights, duties, acts, and obligations of their own citizens, wherever they may be domiciled. 'And so far,' says Story, 'as these rights, duties, obligations, and acts afterward come under the cognisance of the tribunals of the sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim. But where such rights, duties, obligations, and acts come under the consideration of other countries, and especially of the country where such citizens are domiciled, the duty of recognising and enforcing such claim of sovereignty is neither clear nor generally admitted. The most that can be said is, that it may be admitted, *ex comitate gentium*; but it may also be denied, *ex justitiâ gentium*, whenever it is deemed to be injurious to the interests of foreign nations, or subversive of their policy or institutions. No one, for instance, could imagine that a judgment of the parent

<sup>1</sup> Story, *Conflict of Laws*, §§ 537, 538; Henry, *Foreign Law*, ch. viii. p. 54; ch. ix. p. 63; Pardessus, *Droit Com.*, tome v. § 1353; Boullenois, *Traité des Loix*, tome i. pp. 601-635; Blackstone, *Commentaries*, vol. iii. pp. 117, 118, 294; Bowyer, *Universal Public Law*, ch. xvi.; Westlake, *Private Int. Law*, chs. v. vi.; Riquelme, *Derecho Pub. Int.*, lib. ii. tit. i. cap. iii.

country confiscating the property or extinguishing the personal rights or capacities of a native on account of such foreign residence, would be recognised in any other country. And it would be as little expected, as a matter of right, that any other country would enforce a judgment against such persons in the parent country, obtained *in invitum*, on account of a supposed contumacy in remaining abroad, to which he had never appeared, and of which he had received no notice, however it might be in conformity to the local laws.'

§ 18. The same distinguished writer says that it is clear, upon general principles of international law, that a nation has a right of jurisdiction over foreigners resident in the country, and the extent to which such jurisdiction shall be exercised is a matter purely of municipal arrangement and policy. All persons found within the limits of a Government (unless specially excepted by the law of nations), whether their residence is permanent or temporary, are subject to its jurisdiction; but it may, or may not, as it chooses, exercise it in cases of dispute between foreigners. 'Thus, in France, with few exceptions, the tribunals do not entertain jurisdiction of controversies between foreigners, respecting personal rights and interests. But this is a matter of mere municipal policy and convenience, and does not result from any principles of international law. In England and America, on the other hand, suits are maintainable, and are constantly maintained, between foreigners, where either of them is within the territory of the State where the suit is brought. But, though every nation may thus rightfully exercise jurisdiction over all persons within its domains, yet we are to understand that, in regard to suits, the doctrine applies to suits purely personal, or connected with property within the same sovereignty. For, although the person may be within the jurisdiction, yet it is by no means true that, in virtue thereof, every sort of suit may be maintainable against him. A suit cannot, for instance, be maintainable against him, so as to absolutely bind property situate elsewhere, and, *a fortiori*, not absolutely to bind the rights and titles to immovable property.'

<sup>1</sup> Vattel, *Droit des Gens*, liv. i. ch. xix. § 213; liv. ii. ch. viii. §§ 99-103; Wildman, *Int. Law*, vol. i. p. 40; Grotius, *de Fur. Bel. ac Pax*, lib. ii. cap. xviii. § 4; Massé, *Droit Commercial*, tome ii. §§ 164 et seq.



§ 19. The jurisdiction of a State over all real property within its territory results, as a necessary consequence of the rule relating to the application of the *lex loci rei sitæ*. As everything relating to the tenure, title, transfer, descent, and testamentary disposition of real property, is regulated by the local law, so, also, all proceedings in courts of justice relating to that species of property, such as the rules of evidence, the forms of action and pleadings, and rules of decision must necessarily be governed by the same law. This jurisdiction is exclusive. 'In respect to immovable property,' says Story, 'every attempt of a foreign tribunal to found a jurisdiction over it, must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution *in rem*.' 'It is true that property within a country does not make the owner generally a subject of the sovereign where it is locally situate, but it subjects him to his jurisdiction *secundum quid, et aliquo modo*. Mixed actions, so far as they regard the reality, are to be brought in the place *rei sitæ*, but if the personal damages or claims be separable in their nature and character, they may be sued for as personal actions.' The rule of common law is, that personal actions may be brought in any place where the party defendant can be found; that real actions must be brought in the *forum rei sitæ*, and that mixed actions, which are deemed local, are properly referrible to the same tribunals.<sup>1</sup>

§ 20. With respect to jurisdiction over personal property, Story says, the general doctrine is not controverted, that though movables are, for many purposes, to be deemed to have no *situs*, except that of the domicile of the owner, yet, this having but a legal fiction, it yields whenever it is necessary for the purpose of justice, that the actual *situs* of the thing should be examined. The State, in whose territory personal property is actually situate, has as entire dominion, sovereignty and jurisdiction over it while there, as it has over real property, and it may, to the same extent, regulate its transfer, subject it to process and execution, and control its uses and disposition. Hence it is, that, whenever per-

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. §§ 3, 16; Story, *Conflict of Laws*, §§ 551-555; Huberus, *Prælectiones*, lib. i. tit. iii. § 15; Daulson v. Mathews, 4 Term. R. 503; Livingston v. Jefferson, 4 Hall's Am. Law Jour., p. 78; Mostyn v. Fabrigas, Cowper R. 161-176.

sonal property is taken by arrest, attachment, or execution within a State, the title so acquired under the laws of the State is held valid in every other State ; and the same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of the State.<sup>1</sup>

§ 21. Mr. Wheaton considers the rule, with respect to the jurisdiction of a State over personal property or movables within its territorial limits, to be the same as over immovables or real property, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, rules of evidence and prescription are governed by the *lex fori*. 'Thus the *lex domicilii* forms the law in respect to a testament of personal property, or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst, at the same time, the *lex fori* of the State in whose tribunals the suit is pending, determines the forms of process and prescription. Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not, therefore, follow that the distribution is, in all cases, to be made by the tribunals of that place, to the exclusion of those of the country where the property is situate. Whether the tribunal of the State where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion, to be exercised according to the circumstances. It is the duty of every Government to protect its own citizens in the recovery of their debts, and other just claims ; and in the case of a solvent estate, it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the State where it lies. In all civilised countries, foreigners, in such cases, are entitled to prove their debts and share in the distribution. Though the forms in which a testament of personal property, made in a foreign country, is to be executed, are regulated by the local law, such a testament cannot be carried into effect in the State where the property lies, until, in the language of the law of England, *probate* has been obtained in the proper tribunal of such State, or, in the lan-

<sup>1</sup> *Ogden v. Falliot*, 3 *Term. R.* 733 ; *Bissell v. Briggs*, 9 *Mass. R.* 462-469.



guage of the civilians, it has been *homologated*, or registered in such tribunal. So, also, a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another State, without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign State, interfere with the personal property, in another State, belonging to the succession, without having his authority confirmed by the local tribunal.<sup>1</sup>

§ 22. It may be proper to allude, in this place, to the principle which lies at the foundation of the distinctions which have been made by the courts of different countries in the rule of international comity, as applied to contracts *inter vivos* and dispositions *causa mortis*, and as applied to foreign bankrupt laws, and to foreign voluntary assignments for the benefit of creditors. The *jus disponendi*, or right to dispose of property by contracts *inter vivos*, has its origin in the law of nature, and is not the offspring of legislation. And where there is no statutory provision prohibiting or regulating the disposition of property by a particular kind of contract, such a disposition will be considered good and valid. On this point, Pothier, in his *Traité des personnes*, in discussing the laws of France, thus describes the origin and character of this class of contracts: 'Although foreigners may make all sorts of contracts *inter vivos*; although they may, in this manner, dispose of property which they may acquire in France, either by titles onerous or gratuitous, they cannot dispose of property which they own in France, either by testament, or by any other act *causa mortis*, in favour of foreigners or citizens; neither can foreigners take anything by testament, or by any other act *causa mortis*, although they are capable of donations *inter vivos*. This difference, which the law establishes between acts *inter vivos* and acts *causa mortis*, in permitting foreigners to do the former, and prohibiting them from doing the latter, is founded on the very nature of these acts. Acts *inter vivos* are founded on the *droit des gens* (*jus gentium*—or law of nature). Foreigners enjoy every right which arises from the *jus gentium*. They may, therefore, perform all sorts of acts *inter vivos*. The right to make a testament, active or passive, is, on the con-

<sup>1</sup> *Armstrong v. Lear*, 12 *Wheat. R.* 169.

trary, derived from the civil law—*testamenti factio est juris civilis*—foreigners not enjoying what is of civil law, have not this faculty or right.' By the Roman law, the power to make a testament belonged peculiarly and exclusively to citizens. So provides the second cap. Falcidian law. A foreigner, therefore, could not use this power. The decemviral law had granted it to the fathers of families, whom it invested, by this act, with the character of legislators, which would have been degraded if exercised by any other than Roman citizens. In some States, the treasury appropriates the property of foreigners who die there; hence arises their inability to make a testament; but this barbarous law is a disgrace to any legislation. The French law, as we have seen from Pothier, adopted the maxim of the Roman law, *factio testamenti est juris civilis*. For that reason, a foreigner could not dispose of property by testament. He was forbidden by municipal law. But, says Pothier, the right to dispose of property by acts *inter vivos* is founded on the *jus gentium*, the law of nature. And, in truth, it cannot be otherwise. *Dominium*, or the right over things which are ours, consists, according to all writers who have defined it, of two parts, first, the right to dispose of the thing, and secondly, the right to enjoy it exclusively. When either part is wanting, the *dominium* is mutilated. The right to acquire property is the right to hold this *dominium* over things, and no man can be said to have full property in a thing, who has not the right to dispose of it and to enjoy it exclusively. The *jus disponendi* exists then, necessarily, where there is the full right of property.<sup>1</sup>

§ 23. From the same principle results the distinction which is generally made by the courts of the United States between a foreign voluntary assignment for the benefit of creditors, and a foreign assignment in bankruptcy. The *jus disponendi* applies to the former, whereas an assignment under the bankrupt law is a proceeding *in invitum*; the one is a universal natural right applicable everywhere, while the other is a forcible disposition, having its origin in local law, and confined to the jurisdictional limits of the maker of the law. Story, in his Conflict of Laws, § 411, (third edition,) says: 'There is a marked

<sup>1</sup> Pothier, *Traité des personnes*, pt. i. tit. ii. sec. ii.; *Sala Mexicana*, tomo ii. pp. 109, 110; Riquelme, *Derecho Pub. Int.*, lib. ii. tit. i. caps. i.-iv.



distinction between a voluntary conveyance by the owner, and a conveyance by mere operation of law in cases of bankruptcy *in invitum*. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property except that which is within its own territory. This makes a solid distinction between a voluntary conveyance of the owner and an involuntary conveyance by the mere authority of the law. The former has no relation to place, the latter, on the contrary, has the strictest relation to place. The distinction is insisted on with great force by Lord Kaimes. It is, therefore, admitted, that a voluntary assignment by a party, according to the law of the domicile, will pass his personal estate, *whatever may be its locality abroad, as well as at home*. But it by no means follows that the same rule should govern in cases of assignments by operation of law.' The courts of Great Britain apply the rule of comity generally to the laws of bankruptcy as well as to voluntary assignments.<sup>1</sup>

§ 24. Public and private vessels on the high seas and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong. The ocean is common to all mankind, and may be successively used by all as they have occasion. According to Vattel, the domain of a nation extends to all its just possessions, not merely possessions of territory, but also of rights it is entitled to enjoy. It has the right to navigate the ocean which is the territory of no one and its jurisdiction over its vessels so employed on the high seas, results from this right (*droit*) rather than from the jurisdiction which it is entitled to exercise over the persons who compose its fleets or man its private vessels. But this jurisdiction is exclusive only so far as respects offences against its own municipal laws, and not as respects offences against the law of nations, which may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although

<sup>1</sup> Story, *Conflict of Laws*, §§ 408-411; Kaimes, *On Equity*, b. iii. ch. viii. § 6; Kent, *Com. on Am. Law*, vol. ii. pp. 404-408; Westlake, *Private Int. Law*, ch. ix.; *Forbes v. Scannel*, 13 Cal. R. 242.

committed on board a foreign vessel on the high seas.<sup>1</sup> But this jurisdiction of the courts of one nation over international offences committed on board the vessels of another on the high seas, when such vessels are brought within its territorial limits, does not extend to the right of visitation and search for the purpose of obtaining the custody of the offenders, in time of peace, unless expressly permitted by international compact. The right of search for contraband and enemy's goods, in time of war, results from the rights of war, and rests upon principles essentially different, as will be hereafter shown.<sup>2</sup>

§ 25. Where there are no express prohibitions, the ports of one State are considered as open to the public armed and commissioned vessels of every other nation with whom it is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under an express permission, stipulated by treaty, or a permission implied from the absence of prohibition. This exemption extends not only to the belligerent ships of war, privateers, and the prizes of either, who seek a temporary refuge in neutral waters from the casualties of the sea and war, but also to prisoners of war, on board any prize or public vessel of her captor. Such vessels, in the command of a public officer, possess, in the ports of a neutral, the rights of ex-territoriality, and are not subject to the local jurisdiction.<sup>3</sup> But if such prisoners of war be taken on shore, in a neutral port, they become subject to the local jurisdiction, or not, according as it may be agreed between the political authori-

<sup>1</sup> As, for example, piracy.

<sup>2</sup> Vattel, *Droit des Gens*, liv. i. ch. xix. § 216; liv. ii. ch. vii. § 80; Grotius, *de Jur. Bel. ac Pac.*, lib. ii. cap. iii. § 13; Rutherford, *Institutes*, b. ii. ch. ix. §§ 8, 9; the 'Louis,' 2 *Dods. R.* 238; the 'Antelope,' 10 *Wheat. R.* 122; the 'Marianna Flora,' 11 *Wheat. R.* 39; Cushing, *Opinions of U. S. Atty's. Genl.*, vol. viii. pp. 73 et seq.; Riquelme, *Derecho Pub. Int.*, lib. i. pt. ii. cap. ix.

<sup>3</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 95; but this is qualified by other quotations throughout that work. Thus, he says (pt. ii. ch. ii. § 104)—'Whatever may be the nature and extent of the exemption of the public or private vessels of one State, from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers and crew, in violation of the law of nations against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require.'



ties of the belligerent and the neutral powers. Foreign troops stationed in, or passing through, the territory of another State, with whom the foreign State is in amity, are undoubtedly exempt from the civil and criminal jurisdiction of the place. But this right of passage is derived from an express and not an implied permission, which may be given with specified limitations.<sup>1</sup>

[The theory that a ship of war is a continuation of the country to which she belongs, is extra-territorial, and as such is entitled to absolute immunity from foreign law, has been praised by some writers; but it is submitted by the Editor that 'extra-territoriality' is obviously a fiction, and that it belongs to the well-known class of legal fictions, to the imaginary class of absolute rights which played an important part in their day, but which, when confronted by facts, had to be qualified by exceptions and distinctions until at last limited and relative doctrines have been substituted for them. Useful, no doubt, the fiction once was in founding a claim for some exemption before the general international status of European States was matured, and no certain custom could be appealed to; but now it serves only the purpose of begging the question that the ship of war is exempt from the foreign law, the argument being of this kind: Why is the ship exempt from this foreign jurisdiction? Because it is extra-territorial. Why is it extra-territorial? Because it is exempt from all foreign jurisdiction. The fiction of extra-territoriality characteristically denies the essential fact that the ship in the foreign port is within the territorial ambit of another State. It totally ignores the existence of that other State, its inhabitants, its Government, its laws, its interests, its powers, its rights, its duties; indeed, it may be said to ignore all foreign States whatsoever. It ignores the relation of State to State, which is the very thing to be considered. The truth is that jurists habitually resorted to fictions of this nature when they wanted authority for the

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 157, note; Cushing, *Opinions U. S. Atty's. Genl.*, vol. vii. p. 123; Foelix, *Droit International Privé*, § 164; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. xiii.; the *Schooner Exchange v. McFadden et al.*, 7 *Cranch. R.* 135; Phillimore, *On Int. Law*, vol. i. § 341; Hautefeuille, *Des Nations Neutres*, tome i. pp. 475, 476; the 'Betsey,' 3 *Dall. R.* 6; the 'Cassius,' 3 *Dall. R.* 121; the 'Alerto,' 9 *Cranch. R.* 359; See vol. ii. p. 178 et seq.

propositions they desired to lay down. In the facts they saw reasons of convenience or utility, but these they deemed insufficient authority. They therefore created—'presumed'—a contract of a more general character, which seemed to them to furnish the necessary sanctions. Invalid as their general theory was, their conclusions were, of course, often most valuable, and such as later times have more or less fully accepted.

In the case of the 'Exchange' (7 *Cranch. R.* 135), determined in the supreme courts of the United States, the purpose was to pronounce exemption from local jurisdiction. The decision proceeded, not on the fiction of extra-territoriality, but on that of an 'implied licence.'

This vessel had originally belonged to an American citizen, but had been seized and confiscated at St. Sebastian, in Spain, and converted into a public armed vessel by the Emperor Napoleon in 1810, and was reclaimed by the original owner on her arrival in the port of Philadelphia.

When the case was argued, Pinckney, who was counsel for the 'Exchange,' disparaged book-authorities, and put his case thus: 'We are asked, whence we infer the immunity of the public armed vessel of a sovereign? We answer, From the nature of sovereignty, and the universal practice of nations from the time of Tyre and Sidon.'

Marshall, C.J.—'The jurisdiction of courts of justice is a branch of that possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of its restriction, and an investment of that sovereignty, to the same extent, in that power which could impose that restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They could flow from no other legitimate source. This consent might be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal



independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction, within their respective territories, which sovereignty confers. This consent might, in some instances, be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial jurisdiction in a manner not consonant to the usages and received obligations of the civilised world. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, has given rise to a class of cases, in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction, which has been stated to be the attribute of every nation. One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. A second case, standing on the same principle with the first, is the immunity which all civilised nations allow to foreign ministers. Whatever may be the principle on which this immunity might be established, whether we consider the minister as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore in point of law not within the jurisdiction of the sovereign at whose court he resides, still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory; he is supposed to assent to it. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign, inde-

pendent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require. . . . If the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent ; and if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent. The whole reasoning upon which such exemption has been implied, in the case of a sovereign or his minister, applies with full force to the exemption of ships of war in the case in question. It is impossible to conceive, said Vattel, that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power. . . . Equally impossible was it to conceive that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked. . . . A clear distinction is to be drawn between the rights accorded to private individuals, or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation. . . . The situation of a public armed ship is in all respects essentially different ; she constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him on national objects ; he has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State ; such interference cannot take place without seriously affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to



the court should be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality. Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place ; but certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. . . . Without doubt the sovereign of the place is capable of destroying this implication (that the ship of war is exempt from his jurisdiction). He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals ; but until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of the court, to be so construed as to give them jurisdiction in a case in which the sovereign power had implicitly consented to waive its jurisdiction. The court has come to the conclusion that the vessel in question, being a public armed ship, in the service of a foreign sovereign with whom the United States were at peace, and having entered an American port open for her reception on the terms on which ships of war are generally permitted to enter the ports of a foreign power, must be considered as having come into the American territory under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.'

Again, the 'Independencia,' a cruiser, in breach of the laws of neutrality, increased her armament at Baltimore, in October, 1816. She left Baltimore in December, 1816, and the capes of the Chesapeake 8th February, 1817, and shortly afterwards captured the 'Santissima Trinidad.' In March 1817, she came into Norfolk, and part of the cargo taken from the 'Santissima Trinidad' was, with the approbation and consent of the Government of the United States, landed for safe-keeping in the Custom-House store. The owners of the cargo

then took proceedings to recover possession. (The 'Santissima Trinidad,' 7 *Wheat. R.*, 283.)

In this case Mr. Justice Story observes:—

'In the case of the "Exchange" the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory, for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction; but as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time without just offence; and if, afterwards, such public ships come into our ports they are amenable to our laws in the same manner as other vessels.

. . . . It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts, and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange if a license implied by law from the general practice of nations for the purposes of peace should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship by the same implication impose upon those who seek an asylum in our ports. . . . We are of opinion that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been defrauded by a violation of our neutrality.'



Lampredi, writing in 1788 (*Tratt. del Comm.*, p. i. ch. x.), says :—

‘But notwithstanding the extent to which some writers have pushed this strange opinion, born in times in which nations believed themselves absolute masters of immense tracts of the vast sea, that they have arrived at believing and maintaining that vessels of war especially must be considered part of the territory of the nation of which they hoisted the flag, not only in the vast waters of the sea, which do not admit of occupancy, but also in the waters which are occupied (territorial), and also when they have cast anchor in harbours, roadsteads, bays, or waters of foreign nations, which is utterly false, since in the territory of a sovereign there is neither place nor person over which the sovereign does not exercise supreme authority; nor does the character of the conveyance, *i.e.* by land or water, in which foreigners enter the confines of the territory, nor the number, alter in the slightest degree the right of the sovereign.’

The same author, referring to the fact that commanders of vessels of war in territorial foreign waters exercise supreme power, even of death, and that from thence some not very farseeing authors deduce that the ship is foreign territory, since if it were territory of the sovereign of the harbour such a solemn act of power could not be carried out, says—‘That this illusion disappears as soon as it is remembered that this extension of jurisdiction is not founded upon the *jus territorium*, but upon the nature of the military command, which it is understood remains intact and in full vigour so often as the sovereign of the place is pleased to receive a ship of war as such. This could not be the case, nor could the character of a vessel of war be continued, or the vessel of war governed without the continuance of the military command, which in consequence continues to be exercised to its full extent, inside the ship more by concession of the sovereign who receives the ship than by the right of the commander, and still less by any right of the *jus territorium*; hence it happens, that with the exception of the military command which, owing to the quality and nature of a ship of war, remains intact, in every other respect the ship is considered the territory of the sovereign of the port, and the men of the ship are subject to his jurisdiction. This is so true that it is the common doctrine

that even a foreign army, which passes through or stays upon the territory of another, is subject to the jurisdiction of the place, with the exception of the exercise of the military command, which remains intact in the person of the commander by the tacit consent of the sovereign himself, who, having allowed the passage and stay of the foreign army, is considered to have conceded also the military command, without which no army would exist, owing to the common-sense rule that a right being given, all is considered to be given without which that right could not be exercised.'

To this he adds in a foot-note :—' A criminal who has taken refuge on board a ship of war may be asked by courtesy to be surrendered, and if refused, may be legitimately taken by force.'

Azuni endorses the principal remarks of Lampredi in their entirety, and adopts them in his treatise on Maritime Law. (Cap. iii., Art. viii.) See also, Grotius, *De Fur. Bell. ac Pac.*, lib. ii. cap. iii. § 8.

Pinheiro-Ferreira (*Cours de droit public*, tit. ii. art. xviii. § 50) says :—' Après avoir assimilé l'hôtel de l'envoyé au territoire de son pays, les auteurs ont cru, et avec plus de raison, il faut l'avouer, que les vaisseaux de guerre devaient aussi être considérés comme des portions détachées du territoire auquel ils appartiennent, lorsqu'ils sont mouillés dans un port étranger ; les malfaiteurs du pays doivent trouver à leur bord un asile aussi inviolable que dans l'hôtel de l'ambassadeur ou dans les pays mêmes auxquels ces vaisseaux appartiennent. Cette application de leur chimérique fiction aux vaisseaux de guerre est encore plus dénuée de raison que lorsqu'il s'agit de l'hôtel et des équipages de l'ambassadeur.'

On this, Hautefeuille (*Droits des Nations Neutres*, tom. ii. tit. vi.), observes :—' Sans discuter longuement cette question, je me bornerai à faire remarquer que le fait de recevoir à bord un sujet de ce souverain (propriétaire) est un fait extérieur, complètement étranger au gouvernement du bâtiment, un rapport avec le territoire du prince étranger ; et que, par conséquent, d'après les principes mêmes qui servent de fondement à la qualité territoriale du navire, il rentre dans la jurisdiction du peuple propriétaire du port dans lequel se trouve le bâtiment : c'est par ce motif que sur le droit d'asile des cou-



pables à bord des bâtiments étrangers, je partage l'opinion du traducteur de Lampredi et de Pinheiro-Ferreira.'

Bluntschli (*Le Droit International Codifié*, translated by Lardy, lib. iv. art. 321) thus explains the question :—'Exceptionnellement on accorde l'exterritorialité aux navires de guerre étrangers lorsqu'ils sont entrés dans les eaux d'un état avec la permission de ce dernier. L'exterritorialité des navires de guerre repose sur des bases encore plus contraires à la nature que l'exterritorialité des souverains. C'est une concession réciproque que se font les états maritimes, un usage qui, en ayant l'air de reposer sur les rapports de bonne amitié entre les nations, a pour vrai motif la difficulté et le danger pour la police locale d'agir efficacement contre les équipages des navires de guerre. Mais pour que cette exterritorialité soit accordée, il faut toujours que le navire de guerre étranger ait reçu l'autorisation de pénétrer dans les eaux dépendant du territoire de l'état. Les souverains, pour jouir en pays étranger des privilèges de leur rang, doivent également demander au gouvernement du pays l'autorisation de passer la frontière. Les immunités dont les navires de guerre jouissent vis à vis de la police et de la justice locales ne s'appliquent qu'au navire lui-même : elles cessent si l'équipage du navire de guerre, tout en restant à bord, vient à commettre contre les autres navires au mouillage, ou contre les habitants du port, des actes de nature à troubler l'ordre public. L'autorité locale a dans ce cas pleinement le droit de prendre les mesures nécessaires dans l'intérêt de la sûreté générale, et peut même ordonner au navire de guerre étranger de quitter le port. Lorsque l'équipage se rend à terre et y commet des délits, il est justiciable des tribunaux ordinaires ; cependant on doit porter de suite les faits à la connaissance du commandant du navire de guerre, et chercher à s'entendre avec lui pour faire poursuivre et punir les coupables, soit par les tribunaux de la localité, soit par les autorités militaires du navire étranger. Pour être logique on devrait admettre la compétence exclusive des tribunaux du port ; mais le désir de rester en bons rapports avec les puissances étrangères a fait prévaloir l'usage d'étendre dans ce cas la juridiction maritime de l'état étranger.'

In 1820, John Brown, a British subject, commanded a vessel engaged in the revolt against the Spanish Colonies. He was

taken prisoner by the Spaniards, but escaped from prison, and took refuge on board H.M.S. 'Tyne,' lying in the port of Lima. Sir William Scott, being requested by the Admiralty, gave his opinion on the question, as follows:—'Sir,—I have to acknowledge the receipt of your letter dated the 25th ult. enclosing copies of a letter, and its enclosures from Captain Falcon, of H.M.S. "Tyne," and of the case and opinion of the King's Advocate, relative to Mr. John Brown, a native of Ireland, who, being a prisoner in the hands of the Spaniards, effected his escape and came on board the "Tyne," at Callao, and has since arrived on board the same within the realm of England (having claimed the protection of the flag), and acquainting me that their Lordships conceiving that they had no authority to detain him, and being supported in that opinion by the concurrence of the King's Advocate, had allowed him to depart without restraint. Upon this statement I have no observation to make, not being desired by their Lordships to make any; but if my opinion had been required, it would have coincided with what has been advised and done. A more extensive and important question is proposed to me, viz., "Whether any British subject coming on board any of H.M.'s ships of war, in a foreign port and from the judicature of the State within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland?" Upon this question proposed generally I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension is unfounded in point of principle, is injurious to the rights of the Countries, and is inconsistent with those of our own. The rights of territories are local and are fixed by known and determined limits. Ships are mere movables and are treated as such in the general purchase of nations. It is true that armed neutralities have attempted to give them a territorial character, but the attempt when made has been always most perseveringly, and at all hazards, resisted and defeated by the arms of our country, as inconsistent with the rights of hostility and capture. No such character is allowed to protect ships of war, when offending against the laws of neutrality upon the high seas, where no local authority whatever exists; still less can it be claimed where there is a visible and acknow-



ledged authority, belonging to an independent State, in amity with the nation to which the ships of war belong. Such a claim can lead to nothing but to the confusion and hostility which wait upon conflicting rights. The common convenience of nations has for certain reasons, and to a certain extent, established in favour of foreign ships of war, that they themselves shall not be liable to the civil process of the country in whose ports they are lying, though even the immunity has been occasionally questioned. But that individuals, merely belonging to the same country with the ships of war, are exempt from the civil and criminal process of the country in its ordinary administration of justice by getting on board such ship, and claiming what is called the protection of the flag, is a pretension which, however heard of in practice occasionally, has no existence whatever in principle. If the British flag converts a man of war into a British territory, the flag of other nations must be allowed to possess the same property in their marine; for there is no principle whatever that can be appropriated exclusively to the British flag. It therefore must be allowed reciprocally that a Spaniard getting on board a Spanish ship of war lying in Portsmouth harbour shall be protected from British justice. I believe the administration of that justice would return a very speedy and decisive negative to any such pretension on behalf of Spaniards charged with being amenable to British law. But the inconvenient effects of considering such a ship a Spanish territory would go much further—to the extent even of protecting a British criminal who found his way into her. For no process of British justice can be executed on a British subject in a Foreign territory. When I give this as my decided persuasion upon this subject generally, I do not mean to say that in the infinite possibility of events cases may not arise in which such a protection might be indulged. But such cases are justified only by their own peculiar and extraordinary circumstances, which extend no further than to those immediate cases themselves, and furnish no rule of general practice in such as are ordinary. How far the case of Mr. Brown comes within such a description I am not enabled to state confidently by any exact knowledge of the facts, and particularly of the nature and validity of that authority under which the acts charged upon him by the Spaniards are said to have been committed. It would be im-

proper in me to define what the British Government had not thought proper to define. Holding the opinion that before any Act of Parliament or proclamation issued, it was unlawful for a British subject to accept a hostile commission from any persons either in war or rebellion against a State in amity with the Crown of Great Britain, I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the vessel (British), and I add that it was certainly very undesirable to furnish occasions for the lawful use of force in the intercourse of friendly nations. Taking the authority under which Brown acted to be clearly invalid (which I do not mean to assert), I think it might possibly appear that Captain Falcon's conduct was more to be commended for its humanity and spirit than for its strict legality.—William Scott, Grafton Street, 28th November, 1820.'

The following are examples of some cases in which the local jurisdiction prevails over a foreign ship of war :—

1. *Neutrality*.—The right and duty of a neutral State to enforce neutrality within its waters are universally admitted; and since the case of the 'Alabama,' the necessity of due diligence in performing this duty has become very apparent. This duty involves imposing certain restrictions on the belligerent cruisers, and in some circumstances subjecting their officers and men to criminal responsibilities.

2. *Prize*.—If a foreign ship of war brings illegal prize (prize taken in violation of neutrality, &c.) into a neutral port, such prize may be arrested and restored to its proper owner by the Admiralty Court. (See *supra*, decision in the case of the 'Santissima Trinidad;' also British and Foreign Enlistment Act, 33 and 34 Vic. cap. 90, sec. 14.)

3. *Foreign Enlistment Act*.—Officers of foreign ships of war appear to be liable to British tribunals for breaches of the British Foreign Enlistment Act, and punishable by fine and imprisonment. (See sections 6, 7, 11, 24.)

4. *Smuggling*.—Foreign ships of war are not permitted to pursue or capture smugglers in territorial waters, and if need arises, are prevented doing so by force. The territorial authority is thus constantly maintained with more or less display of force by the fortress of Gibraltar against Spanish *gardacostas*.



5. *Quarantine*.—Foreign ships of war are bound to observe the local laws of quarantine. Foreign ships of war are liable to the customs laws, to be searched by the customs officers who may remove goods, &c. (16 and 17 Vic. cap. 107, sec. 52, Customs Consolidation Act, 1853.)

6. *Anchorage*.—Commanders of foreign ships of war are bound to comply with the regulations of the port as to anchoring, taking in, and discharging powder, avoiding collisions, &c.

7. *Salvage, &c.*—In the case of salvage, collision, &c., whether occurring within or without the territorial jurisdiction, where the law of the place or the law maritime, as there recognised, gives a right of lien or arrest by warrant of the Admiralty Court for such claims, it is a moot question whether foreign ships of war are liable to be so arrested. The case of the 'Exchange' before mentioned, though not precisely in point, indicates that such arrest would not be permitted by the American tribunals. And in the case of the 'Charkieh,' (8 *Law. R. Q. B.* 200) where the precise question was raised, but not decided, Mr. Justice Blackburn observed: 'There is authority for saying that courts of justice cannot proceed against a sovereign or a State, and I think there is also authority for saying they ought not to proceed against ships of war or national vessels; and it is obviously desirable that this rule should be established, otherwise wars might be brought on between two countries.' On the other hand, Sir Robert Phillimore (4 *L. R. Adm.* 93) said: 'It is, however, by no means clear that a ship of war to which salvage services have been rendered may not, *jure gentium*, be liable to be proceeded against in a Court of Admiralty for remuneration due to such services. It is very remarkable that Lord Stowell declined to pronounce any opinion upon this point in the case of "The Prins Frederick," (2 *Dods.* 451), though it appears that he had, upon principles of English law, previously declined to entertain a suit of this kind attempted to be instituted by a British subject against a British man-of-war; "The Comus" (referred to *Ibid.* 464). . . . I am disposed to hold that within the ebb and flow of the sea in the case of salvage, the *obligatio ex quasi contractu* attaches *jure gentium* upon the ship to which the service has been rendered, and in the case of collision the *obligatio ex quasi*

*delicto* attaches *jure gentium* upon the ship which is the wrong-doer, whatever be her character, public or private; and such, I think, was the inclination of Lord Stowell's mind in the case of "The Prins Frederick," and in the case of the "Swift" (1 Dods. 320).'

8. *Arrest on shore*.—The right of municipal authorities to arrest on shore and punish officers or men belonging to foreign ships of war, for acts committed on shore, is universally admitted and not seldom acted upon, although it is obvious that the exercise of this jurisdiction might seriously affect the efficiency of the ship of war in question. And Kent (*Law of Nations*, Abdy's edit., 396) says:—'It has also been asserted, on the part of the executive authority of the United States, that a writ of *habeas corpus* may be lawfully awarded to bring up a subject illegally detained on board of a foreign ship of war in their waters. So also it was the official opinion of the Attorney-General of the United States, in 1799, that it was lawful to serve civil or criminal process upon a person on board a foreign ship of war lying within a harbour of the United States.']

§ 26. Private vessels of one State entering the ports of another, are not, in general, exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact. But there are certain exceptions to this rule, which result from the right of asylum, based on the laws of humanity. A vessel driven by stress of weather, or carried by unlawful force into a prohibited port, or into an open port with prohibited articles on board, incurs no penalty or forfeiture in either case. The cases of blockade and carrying contraband are familiar examples of the principle. But the rule of law, and the comity and practice of nations, go much farther than these cases of necessity, and allow a merchant vessel of one State, coming into an open port of another, voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding, to this extent, by consequence, the jurisdiction of the local law. This jurisdiction of a nation over its vessels, while lying in the port of another, is wholly exclusive. For any unlawful acts done by her while thus lying in the port of another State, and for all contracts entered into while there,



by her master or owners, she is made answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption from the local laws be claimed for them. But the comity and practice of nations have established the rule of international law, that such vessel, so situated, is, for the general purpose of governing and regulating the rights, duties and obligations of those on board, to be considered as a part of the territory of the nation to which she belongs. The local authorities, therefore, have a right to enter on board a foreign merchantman in port, for the purpose of enquiry universally, but for the purpose of arrest only in matters within their ascertained jurisdiction. It therefore follows, that, with respect to facts happening on board which do not concern the tranquillity of the port, or persons foreign to the crew, or acts committed on board while such vessel was on the high seas, are not amenable to the territorial justice. All such matters are justiciable only by the courts of the country to which the vessel belongs. So firmly is this doctrine incorporated into the practice of nations that the French regard it as a positive rule of international law, and the French laws do not hesitate to prescribe that, when crimes are committed on board a French vessel in a foreign port, by one of the crew against another of the same crew, the French consul is to resist the application of the local authority to the case.<sup>1</sup>

§ 27. It may be stated, in general terms, that the judicial power of every sovereign State extends : 1st. To all civil proceedings, *in rem*, relating to immovable or real property within its territory ; 2nd. To all civil proceedings, *in rem*, relating to movable or personal property within its territory ; 3rd. To all mixed actions, relating to real and personal property within its territory ; 4th. To all its public and private vessels on the high seas, to its public vessels and their prizes in foreign ports, and, in certain cases, to its private vessels in

<sup>1</sup> Webster, *Dip. and Off. Papers*, pp. 85, 86 ; Massé, *Droit Commercial*, tome ii. §§ 31-44 ; Legaré, *Opinions of U. S. Atty's. Genl.*, vol. iv. p. 98 ; De Clercq, *Formulaire*, tome i. p. 366 ; tome ii. p. 65 ; the 'Creole,' *Com. between U. S. and G. B.*, p. 241 ; the 'Enterprise,' *Com. between U. S. and G. B.*, p. 187 ; Hello, *Revue de Législation*, tome xvii. p. 143 ; Wirt, *Opinions of U. S. Atty's. Genl.*, vol. ii. p. 86 ; Berrien, *Opinions of the U. S. Atty's. Genl.*, vol. ii. p. 378.

foreign ports; 5th. To all controversies respecting personal rights and contracts, or injuries to the person or property, when the person resides within the territory, wherever the cause of action may have originated. In this class of controversies, the judicial power may or may not be exercised, according as is provided by municipal law. This general principle is entirely independent of the rule of the decision which is to govern the tribunal.

With respect to criminal matters, the judicial power of the State extends, with certain qualifications: 1st. To the punishment of all offences against its municipal laws, by whomsoever committed, within its territory; 2nd. To the punishment of all such offences, by whomsoever committed, on board its public or private vessels on the high seas, and on board its public vessels, and, in some cases, on board its merchant vessels in foreign ports; 3rd. To the punishment of all such offences by its own subjects, wheresoever committed; 4th. To the punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed.<sup>1</sup>

<sup>1</sup> Phillimore, *On Int. Law*, pt. iii. chs. xviii.-xx.; Story, *Conflict of Laws*, § 530-583; Henry, *Foreign Law*, chs. viii. et seq.; Gardner, *Institutes*, pp. 1-37. The criminal jurisdiction of the Admiralty of England extends over British ships not only on the high seas, but also in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, though at a spot where the municipal authorities of a foreign country might exercise concurrent jurisdiction, if invoked. Therefore a foreigner was convicted of manslaughter at the Central Criminal Court, committed on board a British vessel in the River Garonne in the French empire, about 35 miles from the sea, and about 300 yards from the nearest shore, within the flow and ebb of the tide; the conviction was held right, under the 4 & 5 Will. c. 36, § 22. (*R. v. Anderson*, 38 *L. J. (M.C.)* 12. A prisoner was indicted at the Central Criminal Court for larceny committed out of an English vessel lying in a river at Wampu in China, twenty or thirty miles from the sea; the prosecutor gave no evidence as to the tide flowing or otherwise at the place where the vessel lay; the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R. v. Allen*, 1 *Mood, C. C.* 494. See also *R. v. Depardo*, 1 *Taunt.* 26. See 6 & 7 Vict. c. 94, and 12 & 13 Vict. c. 96 as to trial of crimes committed on the high seas, in the British colonies or other places out of the British dominion, in which the crown has jurisdiction.

Chilian subjects were ordered by their Government to be banished to England. The master of an English merchant vessel lying in the territorial waters of Chili contracted to, and did, bring them to England. The master, on his arrival in England, was indicted and convicted of assault and imprisonment on the Chilian subjects. Held by the Court of Crown Cases Reserved that the conviction could not be supported for what occurred in Chilian territorial waters, but that the justification ceased when the line of Chilian waters was passed. Persons, whether foreign or British, on board an English ship on the high seas, out of any foreign territory, are as much amenable to English law as they would be on



§ 28. The power of a State over the person of the party guilty of, or charged with, criminal offences, is necessarily

English soil. *R. v. Lesley, Bell.* c.c. 220. A foreigner was found guilty in England of manslaughter on board ship, several thousand miles from England, and two hundred miles from any land. The registered sole owner was an alien born, but described in the register as of London, merchant; and the ship sailed under the British flag. As there was no evidence that the owner had been naturalised or had obtained letters of denization, it was held that there was no evidence that the ship was British, and consequently that the prisoner could not be convicted in England of this offence. *R. v. Bjornsen, L. & C.* 545.

The liability of a shipowner for damage to a pier jutting out into the sea, but attached to the soil of a foreign country, was held to be governed by English law, not by the *lex loci*. 'The *M. Moxham*,' 33 *L. T.* 463.

Although a port is *locus publicus uti pars oceani*, it is also *infra corpus comitatûs*. Therefore, a robbery and assault committed by a pirate in an English haven is not *piracy*, for it is not committed on the high seas; and being within a county, it was, even before the 28 Hen. VIII. c. 15, punishable at Common Law.

If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour: or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is *found* within the jurisdiction of any court of justice in her Majesty's dominions, which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits. 18 and 19 Vict. c. 91, § 21. It has been decided that the word 'found,' above-mentioned, is to be construed 'found at the time of trial.' *R. v. Lopez*, 1 *D. and B. C. C.*, 525.

If any British subject commits any crime or offence on board a foreign ship to which he does not belong, any court in the British dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction in the case; 30 and 31 Vict. c. 124, § 11.

In the Statutes 24 and 25 Vict. c. 95, § 115; c. 97, § 72; c. 98, § 50; c. 99, § 36; c. 100, § 68, for the consolidation of the criminal law, provisions are contained, by which the indictable offences which shall be committed within the jurisdiction of the Admiralty of England or Ireland, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland.

Any offence against the British Foreign Enlistment Act 1870, 33 and 34 Vict. c. 90, may be described in any indictment or other document relating thereto, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

The 26 and 27 Vict. c. 35, after reciting that the inhabitants of certain territories in South Africa to the southward of the twenty-fifth degree of south latitude are not within the jurisdiction of any civilised Government, and that crimes and outrages are likely (unless prevented) to be committed within such territories by British subjects, provides that the laws which are now or which shall hereafter be in force in the colony of the

limited to the extent of its own territory, or to the high seas which is the common territory of all, or to its vessels in foreign ports; for no sovereign State is bound, unless by special compact, to deliver up persons, whether its own subjects or foreigners, charged with, or convicted of, crimes under the laws of another country, upon the demand of a foreign State or its officers. The extradition of persons charged with, or convicted of, criminal offences affecting the general peace and happiness of society, is voluntarily practised by most States, where there are no special compacts, as a matter of general convenience and comity. Some distinguished jurists have

Cape of Good Hope for the punishment of crimes therein committed, are thereby extended and declared applicable to all British subjects within any territory in Africa, being to the southward of the twenty-fifth degree of south latitude, and not being within the jurisdiction of any civilised Government, and that every crime or offence committed by any British subjects within any such territory shall be cognisable in the courts of the colony of the Cape of Good Hope, or of the colony of Natal, or of any British possessions in Africa to the southward of the said twenty-fifth degree of south latitude. Section 2 empowers the Government of the Cape of Good Hope to address commissions to persons to act as magistrates in such territory. And by Section 4, nothing, in the said Act, is to invest Her Britannic Majesty with any title to sovereignty over such territory.

By 29 and 30 Vict. c. 87, it is lawful, by order in council, made under the Foreign Jurisdiction Acts, 6 and 7 Vict. c. 94, and 28 and 29 Vict. c. 116, to assign to, or confer on any court, in any British possessions out of the United Kingdom, any jurisdiction, civil or criminal, original or appellate, which any order in Council might assign to or confer on any court in any country or place out of the British dominions, within which Her Majesty has power or jurisdiction, and further to make provision respecting the enforcement and execution of the judgments, decrees, orders, and sentences of any such court, and respecting appeals therefrom.

The 9 Geo. IV. c. 31 was repealed by the 24 and 25 Vict. c. 95. It is doubtful whether, under this statute, a foreigner was indictable in England, as principal or as accessory, for an attempt to assassinate abroad (*R. v. Bernard*, 1 *F. and F.* 240; and see *R. v. Helsham*, 4 *C. and P.* 394). A foreign sailor was indicted in England under this statute for stabbing and killing a shipmate on shore at Zanzibar; the death took place on board. The offence was held not to be within the statute (*R. v. Matton*, 7 *C. and P.* 450). But a British subject was convicted, under this statute, of the murder of a foreigner out of the Queen's dominions (*R. v. Azzopardi* 2 *Moody C. C.* 288). See also *R. v. Sawyer*, *R. and R.* 294, under the 33 H. VIII., c. 23, and the 24 and 25 Vict. c. 100. A prisoner was indicted in England under 24 and 25 Vict. c. 97, § 42, for conspiracy to destroy a foreign merchant ship. It being admitted that the prisoner was a party to the scuttling on the high seas, the jury were directed to consider whether the prisoner was a party in England to a previous plan to destroy the ship, the principal offence not being triable in that country. *R. v. Kohn*, 4 *F. and F.* 68.

The venue of indictments for high treason, or misprision of treason committed out of England, may be laid in the Queen's Bench, or in such shire as the Queen may appoint, if she appoint a commission to try the



treated this question as a matter of strict right, and as constituting a part of the law and usage of nations. Others, equally distinguished, explicitly deny it as a matter of right. The weight of authority is in favour of regarding it as a matter of comity, rather than of strict right, under the rules of international law as universally received and established among civilised nations. If it be regarded as a right at all, it is one of those *imperfect* rights which cannot be enforced, as the obligation on the other party is also imperfect, and not universally, even if generally, admitted.<sup>1</sup>

offender.—35 H. VIII., c. 2, § 1; 5 and 6 Ed. VI., c. 11, § 6. Treasons committed in Ireland or Scotland since the Union, or in Wales, are not within the 35 H. VIII., c. 2; but treasons committed in the Isle of Man, Guernsey, Jersey, Sark, and Alderney, or in British foreign plantations, are, although they are parts of the dominion of England, but not parts of the realm. See further Coke, *Inst.* 3 & 4.

<sup>1</sup> The law founded on the comity of nations has been that offences which tended to the destruction of society or government, such as treason, were subject to punishment everywhere, and that the ruler of that State where the guilty party fled to had a right of prosecuting him. And it has been argued that since in matters of commerce subjects of one State could sue their debtors in another State, *a fortiori*, Princes who had received injury had a right to require the punishment of the evil-doer.—Weyer's case, 5 *Fac. in B.R.*, Rolles abridg., fol. 530. See further Moore v. Kaye, 4 *Taunt.*, 34; East India Co. v. Campbell, 1 *Ves. sen.* 246.

But a Prince, or one who has been contending for sovereign power, has been held exempt. The King of Scotland refused to deliver up Perkin Warbeck to Henry VII. (who had claimed him as a person not protected by the law of nations), saying that he, the King of Scotland, 'for his part, was not competent judge of Perkin's title, but that he had received him as a suppliant, protected him as a person fled for refuge, espoused him with his kinswoman, and aided him with arms, upon the belief he was a prince, and therefore he could not now, consistently with his honour, negative, and, in a sort of way, put a lie upon all that he had said and done before, as to deliver him up to his enemies.'—See Lord Bacon, *Hist. of Henry VII.* fol. 176.

Edmond de la Pool, Earl of Suffolk, being attainted by Act of Parliament in the twelfth year of Henry VII., fled to Spain. The King of Spain continuously refused to deliver him to England, but eventually did so, on receiving the promise that the Earl should not be put to death.

In 1173 the ambassadors of the Abassines were treacherously slain by one of the Templars at Jerusalem. On demand being made to deliver up the offender, the Grand Master absolutely refused to do so, but added that he had prescribed penance to the culprit, and ordered him to be sent to the Pope.—Tyrius, lib. 20, cap. 23.

Some Florentine merchants having been appointed collectors and receivers of the King's customs and rents in England, Wales, Ireland, and Gascony, fled to Rome, carrying some of the money which they had collected with them. King Edward II. sent his letters of request to the Pope to desire that they might be arrested and their persons and goods seized, and sent to England to satisfy the loss which he had sustained, promising, nevertheless, that they should not lose limb or life. The Pope seems to have acted as requested.—*Rott. Romæ*, n. 4, E. 2, m. 17, *Dorso*.

§ 29. A criminal sentence, pronounced under the municipal law of one State, can have no legal effect in another. If it be a conviction, it cannot be executed without the limits of the State in which it is pronounced; and if such conviction be attended with civil disqualifications in the country where

One Anthony Fazons, who had received 500*l.* of King Edward II., fled with the same to Lorraine. The English King wrote to the Duke of Lorraine that the fugitive might be arrested and his goods seized, whosoever they might be in that territory, in order that satisfaction be made to him.—*Claus 8, E. 2, m. 32, Dorset, pro Rege.*

Queen Elizabeth demanded that Morgan and other British subjects who had committed treason, should be delivered up to her, by the French King. But he refused; for, said he, 'Si quid in Gallia machinaretur, Regem ex jure in illos animadversurum; sin in Anglia quid machinati fuerint, Regem non de eisdem cognoscere et ex jure agere; omnia regna profugis esse libera, regum interesse ut sui quisque regni libertates tueantur.'

By the fifth article of the treaty between Great Britain and Denmark, Feb. 13, 1660, it was provided 'that if any of them who are guilty of the horrid murder committed upon King Charles I., of blessed memory, be either now in the dominions of the King of Denmark and Norway, or shall hereafter come thither, that as soon as it shall be known or told to the King of Denmark, or any of his officers, they be forthwith apprehended, put in safe custody, and sent back into England, or be delivered into the hands of those whom the King of Great Britain shall order to take charge of them and bring them home.'

Napper Tandy, a political offender of '98, was given up by the Senate of Hamburg to the Government of George III.—27 *How. State T.* 1191.

In 1819 one Daniel Washburn was brought up on a *habeas corpus* and charged with theft in Canada. Chancellor Kent held that a State was bound, irrespectively of treaties, to surrender fugitive criminals, and that a magistrate, irrespectively of legislation in that regard, was bound to commit the accused upon proof of the commission of a crime, so as to enable either the home government to extradite the prisoner, or the foreign government to demand him; the prisoner could require his discharge on *habeas corpus*, if not claimed within a reasonable time; whether the prisoner was a subject of the pursuing government or of the home government was immaterial. (4 *Johns Ch. R.* 106.) But in 1835 Judge Barbour (in the Circuit Court) refused to detain a foreigner in prison for the purpose of surrender to his own country, on the ground that without a treaty stipulation the government of the United States was not under any obligation to surrender a fugitive from justice to another government for trial, and that, as a judicial officer of the United States, he had no authority whatsoever either to arrest or detain with a view to such surrender.—2 *Brock and Marsh.*, 493. And in 1837 Mr. Justice Story (*U.S. v. Davis*, 2 *Summ.* 485) followed this example. See also *Opinions of Attorney-General*, iii. 660; *Holmes v. Jennison*, 14 *Peters*, 541.

But in 1864, the United States delivered up one Arguelles to Spain, although there was no extradition treaty between those countries, nor any Act of Congress relating to the same. Mr. Seward said that the extradition was understood to have been effected by virtue of the law of nations, and the constitution of the United States.—*U.S. Dipl. Corr.* 1864, pt. ii. 60-74.

And in 1873, on the same principle the Spanish Government delivered one Bidwell to the British Government, there being no treaty of extradition between those countries. See further the Acts for amending the law of extradition and the notes thereto at the end of this chapter.



pronounced, these disqualifications do not follow the offender into another independent State. In the words of Martens, 'a sentence which attacks the honour, rights, or property of a criminal, cannot extend beyond the courts of the territory of the sovereign who has pronounced it, so that he who has been declared infamous, is infamous in fact but not in law. And the confiscation of his property cannot affect his property situate in a foreign country. To deprive him of his honour and property, judicially, there also, would be to punish him a second time for the same offence.' It follows, from this well-established principle, that if a delinquent should fly from one jurisdiction to another, for the purpose of obtaining a milder punishment, or an acquittal in the tribunals of the country where he should take refuge, such sentence would be a nullity, and of no avail to protect him against a prosecution in the State to which he owed allegiance, or in which the crime was committed. But a conviction or acquittal, in the State where the offence was committed, or to which he owed allegiance, would, of course, be an effectual bar to a prosecution in any other State.<sup>1</sup>

§ 30. The conclusiveness of foreign sentences and judgments, where they are drawn in question in the tribunals of another State, will depend upon the nature of the action, and the usage of the different nations, and the special compacts between them. In personal actions, *res adjudicata*, in one country, can have, *per se*, no effect in another. The effect attached to a foreign judgment is different in different countries. In English and American courts, a foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to have it enforced, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evidence of a debt; but if it appears, from the record of the proceedings upon which the original judgment was founded, that it was unjustly or fraudulently obtained, or resulted from false premises, or a palpable mistake of the law applicable to the case, it will not be enforced. In France, the operation of a foreign judgment is restrained within still narrower limits. As between different States, united together into a composite State or federal union, the organic constitution, or municipal

<sup>1</sup> Martens, *Précis du Droit des Gens*, §§ 86, 94, 104.

law, will determine the degree of credit and effect which a judgment obtained in one shall have in the other States. Thus, in the United States of America, a judgment in one State has, in all the others, the conclusive effect of a domestic judgment.<sup>1</sup>

§ 31. Foreign judgments or sentences of a court of competent jurisdiction, proceeding *in rem*, such as the sentences of prize courts, courts of admiralty, and revenue courts, are conclusive as to the proprietary interest in, or title to, the thing in question, wherever the same comes incidentally in controversy in the tribunals of another State. 'Whatever doubts may exist,' says Wheaton, 'as to the conclusiveness of foreign sentences, in respect of facts collaterally involved in the judgment, the peace of the civilised world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.'<sup>2</sup>

§ 32. If a foreign court exercises a jurisdiction which, according to the law of nations, its sovereign could not confer upon it, its sentence or judgment is not available in the courts of any other State, and the courts in which such judgment is brought in controversy will determine the question of jurisdiction for themselves; but so far as its jurisdiction depends upon municipal law, or its proceedings are governed by municipal rules, it is the exclusive judge of its own jurisdiction and of the regularity of its own proceedings, and its decision on these points binds the world. 'Of its own jurisdiction,' says Chief Justice Marshall, 'so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected.' If the proceedings are

<sup>1</sup> Kent, *Com. on Am. Law*, vol. ii. p. 119; Klüber, *Droit des Gens*, § 59; Foelix, *Droit Int. Privé*, §§ 293-311; Frankland v. McGusty, 1 Knapp. R., p. 274; Becquet v. McCarty, 3 B. and A. R., p. 951; Mills v. Duryee, 7 Cranch. R., p. 481; Hampton v. McConnell, 3 Wheaton R., p. 234; Riquelme, *Derecho Pub. Int.*, lib. ii. tit. i. cap. ix.; Westlake, *Private Int. Law*, ch. xii.; Gardner, *Institutes*, p. 146.

<sup>2</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 18; Vattel, *Droit des Gens*, liv. ii. ch. vii. §§ 84, 85; Story, *Conflict of Laws*, §§ 585, 591-593; Croudson v. Leonard, 4 Cranch. R., p. 434; Gilston v. Hoyt, 3 Wheat. R., p. 246; Duchess of Kingston case, 11 Howell's State Trials, p. 261; Massé, *Droit Commercial*, tome ii. §§ 298-325.



'merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world.' Thus, if the court of one country condemn a vessel as a prize under the *law of nations*, and the sentence is brought in controversy in the court of another State, the latter may examine into, not only the 'authority of the former to act as a prize court,' but also 'whether the vessel condemned was in a situation to subject her to the jurisdiction of that court.' But 'if the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitæ*, is held of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. And this results from the very nature of the case, for no other court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, the judgment of the *forum rei sitæ* is held absolutely conclusive. *Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt*. And the same principle is applied to all other cases of proceeding, *in rem*, as to movable property, within the jurisdiction of the court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country, where the same question comes, directly or indirectly, in judgment before any other tribunal.'<sup>1</sup>

§ 33. As a general rule, courts do not take judicial notice of the laws of a foreign country, but they must be proved, not as facts to the jury, but as facts to the court. The court, therefore, decides what is the proper evidence of such laws, and of their applicability to the case in hand. The manner of proof must vary, according to circumstances. The general principle is, that the best proof shall be required which the nature of the case admits of. But to require such proof of the laws of a foreign State as its institutions and usages do not admit of, would be unjust and unreasonable. The usual

<sup>1</sup> Croudson *v.* Leonard, 4 *Cranch. R.* 434; Williams *v.* Armroyd, 7 *Cranch. R.* 423; Grant *v.* McLachlin, 4 *Johns. R.* 34.

A French tribunal has no jurisdiction over contracts entered into between a native of France and a foreign Government. Sirey, *Arrêts de la Cour de Cassation*, 1849, p. 81. Compare herewith Duke of Brunswick *v.* King of Hanover, 1 *H. of L. Cas.* 1.

modes of authenticating the written laws of a foreign country are, by an exemplification of a copy under the great seal of the State, or by a certificate of some duly authorised officer, which certificate must be duly authenticated, or by a copy proved to be a true copy. Some States do not use any great seal for such purposes, but copies of the laws, decrees, and orders are certified to by the minister, with his signature and rubric, or signature alone, under whose care the archives are kept. In others, there is a particular officer appointed as keeper of the archives, and who is authorised to authenticate copies thereof. The rule of evidence must therefore vary with the institutions and usages of the country whose written laws are to be proved. 'But foreign unwritten laws, customs, and usages,' says Story, 'may be proved, and indeed must ordinarily be proved, by parole evidence. The usual course is, to make such proof by the testimony of competent witnesses, instructed in the law, under oath. Sometimes, however, certificates of persons in high authority have been allowed as evidence.' These questions of evidence are generally determined by the municipal laws of the place where the foreign law is to be proved.<sup>1</sup>

§ 34. The same may be said of the proof of contracts, instruments, and other acts made or done in one country and offered in evidence in another. In some cases, it is sufficient to prove them in the manner and by the solemnities and proofs which are deemed sufficient by the law of the place where they are executed; and, in others, they are required to be proved according to the law of the place where the action or other judicial proceeding is instituted. On this subject, the law and practice of different States differ, as also the opinions of publicists. 'There are very few traces to be found in the reports of the common law,' says Story, 'of any established doctrines on the subject.' Where such instruments and acts can be proved according to the *lex fori*, such proofs are usually required, but if such evidence cannot be produced, and there is no municipal law to the contrary, evidence deemed competent in the place where the instruments were executed, is usually admitted in the place where

<sup>1</sup> Church v. Hubbart, 2 Cranch. R. 238; In Re Dormy, 3 Hagg. R. p. 467-469; Mostyn v. Fabrigas, Cowper R. 174; Lincoln v. Battel, 6 Wend. R. 475.



the proceeding is instituted. Thus in Scotland, if the law of the foreign country allows the payment of a debt constituted by writing to be proved by parole, such proof is allowed, although, if the contract had been so made in Scotland, it would not be established by such evidence. In France, proof is admitted by parole of a debt contracted in England, although such proof was not admissible in such a contract made in France.<sup>1</sup>

§ 35. Foreign judgments are, as a general rule, to be authenticated in the same manner as other instruments and documents executed in another country. The most usual mode of proof is by an exemplification under the great seal, but this is by no means the only one. The public seal of a foreign sovereign or State, affixed to a judgment, is generally the highest and most convenient evidence of its authority. 'Courts of other countries,' says Story, 'will judiciously take notice of such public seal, which is therefore considered as proving itself. But the seal of a foreign court does not prove itself, and therefore must be established as such by competent testimony. There is an exception to this rule in favour of courts of admiralty which, being courts of the law of nations, the courts of other countries will judiciously take notice of their seal, without positive proof of its authenticity.' Chief Justice Marshal has laid down the general rule, with respect to the authentication of foreign judgments, and which is also applicable to almost all foreign documentary evidence, as follows: 'Foreign judgments are authenticated, *first*, by an exemplification under the great seal; *secondly*, by a copy proved to be a true copy; *thirdly*, by a certificate of an officer authorised by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign

<sup>1</sup> Voet, *De Stat.*, ch. ii. No. 9, § 5; Story, *Conflict of Laws*, §§ 629, 636; Erskine, *Institutes*, b. iii. tit. ii. §§ 39, 40; *Trasher v. Everhart*, 3 *Gill. and Johns. R.* 234, 242; *Cogswell v. Dolliver*, 2 *Mass. R.* 217; *Massé, Droit Commercial*, tome ii. §§ 326 et seq.; *United States v. Wiggins*, 14 *Peters. R.* 347; *Owings v. Hull*, 9 *Peters. R.* 625; *United States v. Perchman*, 7 *Peters. R.* 85; *United States v. Delespine*, 12 *Peters. R.* 655; *Gaines v. Relf*, et al., 12 *Howard R.* 522; *Houston v. Perry et al.*, 3 *Texas R.* 392; *Bowman v. Sandburn*, 5 *Foster's R.* 113; *Mauri v. Hefferman*, 13 *Johns. R.* 72; *Re Marianne Clericetti*, 30 *Law and Eq. R.* 532; *Riquelme, Derecho Pub. Int.*, lib. ii. tit. i. cap. iii.

judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received.' But this inferior class of testimony will not be received unless it be shown that there was some insuperable impediment to the use of either of these modes, for, continues Chief Justice Marshal, 'the court cannot presume such impediment to have existed.' There are numerous cases illustrating the application of these rules, and showing the admissibility of inferior evidence where the original documents could not be produced by the party, and where there were insuperable impediments to the use of either of the modes of proof specified. All these cases, however, are referable to the general principle, that the party offering documentary evidence must produce the best in his power, or the best which, under the circumstances of the case, he was able to procure. No one can be required to do an impossibility, nor will anyone be deprived of his rights for not producing what is beyond his reach.<sup>1</sup>

[It may be proper before closing this article to offer some few remarks on the vexed question of slavery.

The institution of villenage or prædial slavery prevailed in England, as in other European States, throughout the Middle Ages.

Some slaves were called *villeins regardant*; these were annexed to the land and passed with it whenever it changed owners. Others were called *villeins in gross*; these passed from master to master by sale and without regard to any land. But a master could at any time, by separate deed, sever a *villein regardant* from the land and sell him as a *villein in gross*.

The lot of a villein was most miserable. His service was uncertain, and its nature and amount was entirely dependent on the caprice of his master. He knew not in the evening what

<sup>1</sup> Story, *Conflict of Laws*, § 643; Massé, *Droit Commercial*, t. ii. §§ 336 et seq.; Starkie, *On Evidence*, pt. ii., § 92; Phillips, *On Evidence*, vol. i., p. 432; vol. 2, pp. 133 et seq.; Westlake, *Private Int. Law*, ch. xii.; Gardner, *Institutes*, p. 146; Church v. Hubbard, 2 Cranch, R. 238; Henry v. Adey, 3 East R. 221; Andrews v. Herriott, 4 Cowen R. 526, note; Yeaton v. Fry, 5 Cranch, R. 335; Thompson, v. Stewart, 3 Conn. R. 171; Delafeld v. Hurd, 3 Johns. R. 310; De Sobry v. De Laistre, 2 Harr. and Johns. R. 193; Prichard v. Bailey, 6 Foster's R. 167; Spaulding v. Vincent, 24 Vermont R. 504; Cotton v. Underhill, 4 McLean R. 199; Stewart v. Swanzy, 23 Miss. R. 502; Castrique v. Imrie, C. P. Weekly R. 1860, vol. viii. 344; Barber v. Lamb, *ibid.* 461; 'General Steam Navigation' v. Guillon, 4 M. & W. 894.



he was to do in the morning, but he was bound to do whatever he was commanded. He might be beaten, imprisoned, or otherwise chastised by his master, save that the latter was punishable for the murder or mayhem of a slave, or for the violation of a neif, or female slave. Any property which the slave might acquire passed to his master. The children of a villein, irrespective of the degree of the mother, were slaves, and if a villein who belonged to one master married a neif belonging to another, the issue of such marriage were equally divided between the two masters. The process of enfranchisement was due to profound social causes, and was very gradual. It was accomplished in various ways.

Froissart, temp. Edward III., says, 'Un usage est en Angleterre, et aussi est-il en plusieurs pais, que les nobles ont grants franchises sur leur hommes, et les tentent en servage.'

But it can scarcely be supposed that slavery was considered inhuman, or was practised with inhumanity, by the early Christians; for, while their houses were full of slaves, they were ready to lay down their lives or forfeit all worldly goods in support of their religion. Moreover, St. Paul's Epistle to Philemon, to excuse Onesimus, a runaway slave of Philemon, for the act he had committed, contains no suggestion that slavery is in itself contrary to Christianity. Such an occasion would obviously have been one to declare against the practice.

By 1 Edw. VI., chap. iii., a vagabond or idle servant was to become a slave to his master. Other English statutes (beside the *permissive* Colonial Acts) contain references to slavery.

In the result villenage fell into desuetude and disappeared; it was never abolished by law. The last case met with is that of *Piggs v. Caley* (Noy. 27) in the fifteenth year of James I. Meanwhile the theory of the law of nature continued extremely active in many directions. Its operations were very conspicuous in constitutional, municipal, and, above all, international law. But it did not avail to prevent or even check the hideous system of slave-trade and slavery in the colonies, which sprang into existence under the impulse of an almost unrestrained cupidity on the part of all European nations, and which soon obtained recognition in statutes and ordinances of the mother countries.

In 1553 twenty-four negroes were brought to England from the coast of Africa, and, it would appear from the circumstances, sold in England also.—Hakluyt, vol. i., part ii. p. 97.

Rymer gives a commission from Queen Elizabeth in 1574 for inquiring into the lands, tenements, and other goods of all her bondmen and bondwomen in the counties of Cornwall, Devonshire, Somerset, and Gloucester, such as were by blood in a slavish condition, by being born in any of her manors, and to compound with all or any such bondmen or bondwomen for their manumission and freedom.

On the other hand, during the same reign, Sir John Hawkins, in a Queen's ship, carried on the slave trade in its worst form. (Barrow's 'Life of Drake,' p. 8.)

In the reign of Charles II. the Court of King's Bench decided that negroes, being usually bought and sold among merchants as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover in that court. (Butts v. Penny, 2 Lev. 201.)

'I may not forget,' says Evelyn in 1685, 'a resolution which His Majesty made, and had a little before entered upon it at the Council Board at Windsor or Whitehall, that the negroes in the plantations should all be baptized, exceedingly declaiming against that impiety of their masters prohibiting it, out of a mistaken opinion that they would be *ipso facto* free.' ('Diary,' p. 157.) He also mentions that on June 19, 1682, the Bantame, or East India Ambassadors, in London, were attended by several slaves.

It is remarkable that the *habeas corpus* Act itself excepted from the benefit of that statute persons who, by contract in writing, had agreed with a merchant or owner of a plantation to be transferred beyond seas and had received earnest on such agreements.

In the reign of Queen Anne, a negro was sold in Cheap-side. On motion in arrest of judgment for the debt, the Court of Queen's Bench held that as soon as a negro comes to England he becomes free, and drew a distinction between a villein and a slave, viz., that the former might exist in England, but not the latter. It must, however, be allowed that the distinction is not very evident. The Court further directed that the declaration should be amended to show that,



although the sale was effected in London, the negro at the time of the sale was in Virginia, holding that by the laws of that country negroes were then saleable, for the laws of England did not extend to Virginia; being a conquered country its law was what the King pleased. The Attorney-General said that slaves were inheritances, and only transferable by deed. (*Smith v. Brown*, 2 *Salk.*, 666.)

In *Smith v. Gould* (*ibid.*), the Court seemed to think that in an action of trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him. In the reign of George III., Lord Chancellor Northington, in dismissing a bill filed against a negro who was in England, decided, in contradiction to the historical fact of prædial slavery or villenage in England, that 'as soon as a man sets foot on English ground he is free.' And he added: 'A negro may maintain an action against his master for ill-usage, and may have an *habeas corpus*, if restrained of his liberty.'—*Stanley v. Harvey* (2 *Hagg.* p. 116).

Nine years afterwards Lord Mansfield decided the now well-known case of *Somerset v. Stewart*. (*Lofft.* 1.) A negro having been bought in Virginia as a slave was brought by his master, an inhabitant of Virginia, to England, and on refusing to return was sent by his master to Captain Knoles's ship, where he was kept in irons, to be carried to Jamaica and sold as a slave. The Court of King's Bench, upon a writ of *habeas corpus*, ordered him to be discharged and set at liberty. Lord Mansfield said: 'The return states that the slave departed and refused to serve, whereupon he was kept to be sold abroad. So high an act of dominion must be recognised by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reason, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences may follow from this decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged.'

This celebrated decision of Lord Mansfield indirectly con-

tributed not a little to the downfall of the execrable slave-trade and colonial slavery, as it gave a legal sanction to the growing popular opinion on the subject. It has passed into one of the landmarks of the law, and is safe from attack.

Nevertheless, it is to be remarked—1. That Lord Mansfield's reasoning, however absolute, is wanting in precision. He does not grapple in argument with the real difficulty of the case—the existence of the colonial law and the imperial statutes in favour of colonial slavery. 2. Lord Mansfield, though he had evidently considered it, does not base his judgment on the argument advanced for the slave, that the adoption of the *lex loci* (the extraneous law) would produce intolerable inconveniences—inconsistencies. 3. Lord Mansfield formally rests upon the absence of a positive law directly sanctioning negro slavery in England. There never is any positive law applicable when foreign law is applied; but here he says the want of a positive law concludes the Court, because slavery 'is so odious that nothing can be suffered to support it but positive law.' In effect he accepts the first argument for the slave, that slavery is contrary to the law of nature and unjust, and should not be allowed. As this argument has nothing local in it, but is universal in its scope, it went far beyond the requirements of the case in hand, and condemned and disallowed the law of slavery in the colonies (so far, at least, as it was customary). Doubtless this was its great merit in the sight of many, and it helped to produce great and good results, but it is essentially repugnant to modern legal ideas and the conception of the limits of the judicial province. Granted that slavery is odious and unjust; but if it be the established law of any part of the realm, the duty of the judge is to maintain the law, and the proper remedy, as Lord Stowell points out, is legislation.

But is the principle upon which the case of *Somerset* was decided (that by the law of England a slave ceases to be a slave directly he arrives in England, and thenceforth is in England absolutely and unconditionally free) applicable to the case of a fugitive slave making his escape to a British ship in the territorial waters of a foreign State where slavery is recognised as legal? In the latter case it must be shown that the British ship is in law a portion of Her Majesty's dominions, as completely and unconditionally as any part of



England itself. But leaving out of consideration the case of a private British ship, a public British ship within the territorial waters of a foreign country can only in a limited sense be said to be part of the territory of Great Britain, as has been before observed (p. 177), and she is not so completely part of such territory that a slave stepping on her deck becomes free.

Such a ship, in such circumstances, is exempt from any other jurisdiction than that of the State to which she belongs, upon considerations of public comity and convenience, and by reason of a presumed consent of nations, that foreign public ships coming into their ports shall, so long as they demean themselves according to law, and in a friendly manner, be exempt from local jurisdiction.

Chief Justice Best, in the course of a very strong anti-slavery judgment, says:—'The moment they (the slaves) put their feet on board of a British man-of-war, not lying within the waters of East Florida, where undoubtedly the laws of that country would prevail, those persons, who before had been slaves, were free.' *Forbes v. Cochrane* (3 D. & R. 679). The learned judge evidently was of opinion that a slave escaping to a man-of-war lying in the territorial waters of a slave State would retain his status of slavery. This was in 1815, and the special case states 'that Sir George Cockburn sailed in the "Albion" with the said Spanish slaves from East Florida, at which time he received intelligence of peace between England and America, and such slaves as belonged to American subjects, and were in possession of the defendants (British officers), *were not taken away*, in consequence of the wording of the treaty of peace.' This was in consequence of the Treaty of Ghent (Hertslet, ii. 394). The slaves which had come from plantations in the United States on board, as the above case shows, one (at least) of His Majesty's ships, were given up. See also *Madrazo v. Willes*, 3 Barn. & Ald., 353; *Williams v. Brown*, 3 Bos. & Pull., 69.

With regard to British ships, whether public or private, on the high seas, their decks are considered part of the British territory, and if a slave gets on board a ship upon the high seas there can be no doubt but that he becomes *ipso facto* free. But Lord Stowell, in the case of the slave Grace (R. v. Allan, 2 Hagg. Adm. R. 94), decided that if the slave who has become free by coming to England finds his way back to

the State in which he was in slavery, his status of slavery revives. This decision does not appear to have been ever overruled.

Jack Martin, a slave, ran away from Antigua, and entered on board H.M.'s ship 'Cygnet.' Whilst that vessel was in the roadstead of Antigua, the slave was taken out of it with the consent of the commander, who gave him up, and he was returned to his owner. In January, 1826, he was seized by an officer of the Customs (as a slave illegally imported), and proceedings were instituted against the owners on an information in the same terms and to the same effect as in other cases. The Vice-Admiralty Court had pronounced in favour of the owners, and Lord Stowell affirmed the sentence. (*Ann. Reg.*, 1827, p. 355.)

The 'Slave Circulars' of July 31, 1875, and December 5, 1875, respectively, addressed by the British Admiralty to the commanding officers of British vessels of war, were based on the principles shown in the foregoing pages. The former circular is repealed; the following, the result of a Royal Commission on the subject, is the text of the latter:—

' Admiralty, December 5, 1875.

*(Receipt of Fugitive Slaves.)*

' My Lords Commissioners of the Admiralty are pleased to issue the following Instructions for the guidance of the Commanders of Her Majesty's ships in reference to the receipt of Fugitive Slaves.

' These Instructions are to be considered part of the General Slave Trade Instructions, and to be inserted at page 29 of that volume, with the heading of "Receipt of Fugitive Slaves," but they are also intended for the guidance of commanders of Her Majesty's ships generally.

' 93A. When any person professing or appearing to be a fugitive slave seeks admission to your ship on the high seas, beyond the limits of territorial waters, and claims the protection of the British flag, you will bear in mind that, although Her Majesty's Government are desirous, by every means in their power, to remove or mitigate the evils of slavery, yet Her Majesty's ships are not intended for the reception of persons other than their officers and crew. You will satisfy



yourself, therefore, before receiving the fugitive on board, that there is some sufficient reason in the particular case for thus receiving him.

'93B. In any case in which, for reasons which you deem adequate, you have received a fugitive slave into your ship, and taken him under the protection of the British flag upon the high seas, beyond the limit of territorial waters, you should retain him in your ship, if he desires to remain, until you have landed him in some country, or transferred him to some other ship, where his liberty will be recognised and respected.

'93C. Within the territorial waters of a foreign State, you are bound, by the comity of nations, while maintaining the proper exemption of your ship from local jurisdiction, not to allow her to become a shelter for those who would be chargeable with a violation of the law of the place. If, therefore, while your ship is within the territorial waters of a State where slavery exists, a person professing or appearing to be a fugitive slave seeks admission into your ship, you will not admit him, unless his life would be in manifest danger if he were not received on board. Should you, in order to save him from this danger, receive him, you ought not, after the danger is past, to permit him to continue on board ; but you will not entertain any demand for his surrender, or enter into any examination as to his status.

'93D. If, while your ship is in the territorial waters of any Chief or State in Arabia, or on the shores of the Persian Gulf, or on the East Coast of Africa, or in any island lying off Arabia, or off such coast or shores, including Zanzibar, Madagascar, and the Comoro Islands, any person should claim admission to your ship and protection on the ground that he has been kept in a state of slavery contrary to treaties existing between Great Britain and the territory, you may receive him until the truth of his statement is examined into. In making this examination it is desirable that you should communicate with the nearest British Consular Authority, and you should be guided in your subsequent proceedings by the result of the examination. In any case of doubt or difficulty, you should apply for further instructions either to the senior officer of your division, or the Commander-in-Chief, who will, if necessary, refer to the Admiralty.

'93E. A special report is to be made of every case of a fugitive slave seeking refuge on board your ship.

'By command of their Lordships,—Vernon Lushington.'

The following Treaties have been ratified by Great Britain with Slave States, viz. :—

Treaty with Tripoli, October 18, 1662 (1 Herslet's Com. Treat., 127).

Ditto, 1675-6. (Ditto, 131).

Ditto, 1716. (Ditto, 141).

Ditto, 1751. (Ditto, 147).

Treaty with Tunis, 1716. (Ditto, 163).

Ditto, 1751. (Ditto, 169).

They all contain a stipulation, of which the following are examples, and *by virtue of which* a slave may become free. Thus

Treaties and conventions of extradition have been concluded between the principal States. The following is a list of the more important :—

AUSTRIA with Baden, 1829; Belgium, 1853; additional with Belgium, 1857; Sardinia, 1792; Switzerland, 1828.

AUSTRO-HUNGARY with Italy, 1869; additional with Italy, 1871; Montenegro, 1872; Belgium, 1872; Great Britain, 1873; Greece, 1874; Russia, 1874.

BELGIUM with Great Britain, 1872, 1876, and 1877; Russia, 1872; Luxemburg, 1872; Brazil, 1873; United States, 1874; Switzerland, 1846 and 1874; Monaco, 1874; Peru, 1874; Prussia, 1836; France, 1874; Italy, 1875.

BRAZIL with Italy, 1872; Great Britain, 1872 and 1873.

COSTA RICA with Italy, 1873.

DENMARK with Great Britain, 1873; Italy, 1873; Spain, 1767; Prussia, 1820; Sweden and Norway, 1823.

EQUADOR with United States, 1872.

FRANCE with Belgium, 1834; Italy, 1870; Netherlands, 1844 and 1860; Portugal, 1854; Spain, 1765 and 1850; Sweden, 1843; Switzerland, 1828; Wurtemberg, 1765; West Indies, 1866.

GERMANY with Italy, October 31, 1871 (extended in October, 1873, to pass prisoners through Switzerland); Switzerland, 1874; Belgium, 1870 and 1874; Netherlands, 1818; Great Britain, 1872.

GREAT BRITAIN with Austria, 1873; Brazil, 1872; Belgium, 1877, 1876, and 1877; Denmark, 1862 and 1873; France, 1843 and 1852; Germany, 1872; Italy, 1873; Sweden and Norway, 1873; Switzerland, 1874.

ITALY with Switzerland, 1868; Mexico, 1870; Salvador, 1871; Russia, 1871.

NETHERLANDS with Prussia, 1850.

PORTUGAL with Switzerland, 1873.

RUSSIA with Prussia, 1844; Switzerland, 1873.

SPAIN with Prussia, 1860; Portugal, 1823; Russia, 1877.

THE UNITED STATES with Austria, 1856; Baden, 1857; Bavaria, 1853; Dominican Republic, 1867; Great Britain, 1842; France, 1843 and 1845; Hanover, 1855; Hawaiian Isles, 1849; Hayti, 1864; Italy, 1868; Netherlands, 1874; Nicaragua, 1870; Prussia (and on behalf of other German States) 1852; Salvador, 1870; Peru, 1870; Turkey, 1874; Sweden and Norway, 1866; Switzerland, 1850; Venezuela, 1861.



by Art. 11 of the Treaty between Great Britain and Tripoli, 1675-76, it is declared that 'when any of His Majesty's ships of war shall appear before Tripoli, upon notice thereof

It is against the law of England to send a subject out of the realm without some legal provision to that effect. For this reason a treaty of extradition between England and a foreign country could not formerly be enforced without a special Act of Parliament. But this is no longer necessary since the passing of the 33 and 34 Vict. c. 52 (amended by 36 and 37 Vict. c. 60), which is a general Extradition Act.

It has been held in the United States that a treaty, being the supreme law of the land, is entitled when brought to the notice of courts of law to the same consideration as an Act of Congress (*Re Metzger*, 5 *How. R.*, 117). However, in consequence of some technical difficulties suggested in that case, 'An Act for giving effect to certain treaty stipulations between this and foreign Governments for the apprehension of and delivering up certain offenders' was passed by the United States on the 22nd August, 1848, and applies to all extradition treaties. On the 22nd June, 1860, this Act was amended as regards papers to be offered in evidence. (See also *Re Kaine*, 14 *How.* 103; *Re Van Cernam*, *Up. Can. R.* 4 *C.P.* 288.)

The following is the General Extradition Act of Great Britain:—33 and 34 Vict. c. 52, 'An Act for amending the law relating to the extradition of criminals.'

1. This Act may be cited as the Extradition Act, 1870.

2. Where an arrangement has been made with any foreign State with respect to the surrender of such State of any fugitive criminals, Her Majesty may, by order in Council, direct that this Act shall apply in the case of such foreign State. Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in, or suspected of being in, the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient. Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement. Every such order shall be laid before both Houses of Parliament either six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.

[An order in Council of February 4, 1875, embodied the extradition treaty with Switzerland, which contained the clause following: 'No Swiss subject shall be delivered up by Switzerland to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the Government thereof to Switzerland.' It was held by the Court of Queen's Bench that the treaty with the condition that no English subject should be surrendered to Switzerland was given effect to in the manner required by the Act, and that the prisoner, an English subject, who had committed larceny in Switzerland, could not be surrendered. (*Re Wilson*, 26 *W.R.* 44.)

In 1845 the United States rejected a treaty with Prussia because the latter required that neither power should be required to give up its own subjects; but this was waived by the former in 1852.]

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of political character, or if he prove to the satisfaction of the police magistrate or the

given by the English Consul, or by the commander of the said ships, to the chief Governor of Tripoli, public proclamation shall be immediately made to secure the Christian cap-

court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character. [Treaties of extradition where Great Britain has been a party have never included political offenders or slaves. Indeed, slaves have been expressly excepted. See 15 and 16 Vict. c. 26.]

(2) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

(3) A fugitive criminal who has been accused of some offence within English jurisdiction, not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.

(4) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

4. An order in council for applying this Act in the case of any foreign State shall not be made unless the arrangement (1) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year, and (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

5. When an order applying this Act in the case of any foreign State has been published in the *London Gazette*, this Act (after the date specified in the order, or if no date is specified after the date of the publication) shall, so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any contained in the order, apply in the case of such foreign State. An order in council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign State mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

6. Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in, or suspected of being in, any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended or surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

7. A requisition for the surrender of a fugitive criminal of any foreign State who is in, or suspected of being in, the United Kingdom shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a



tives, and if after that any Christians whatever make their escape on board any of the said ships of war, *they shall not be required* back again, nor shall the said Consuls or com-

political character, he may, if he thinks fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime who is in, or suspected of being in, the United Kingdom, may be issued :—

(1) By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed, or the criminal convicted, in England ; and

(2) By a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint, and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought, and the prisoner shall accordingly be brought, before a police magistrate.

A fugitive criminal, apprehended on a warrant issued without the order of the Secretary of State, shall be discharged by a police magistrate, unless the police magistrate, within such reasonable time as with reference to the circumstances of the case he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner and have the same jurisdiction and powers as near as may be as if the prisoner were brought before him charged with an indictable offence committed in England. The police magistrate shall receive any evidence which may be tendered to show that the crime, of which the prisoner is accused or alleged to have been convicted, is an offence of a political character, or is not an extradition crime.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

manders of any of His said Majesty's subjects be obliged to pay anything for the said Christians.'

Again by the Treaty of 1751 between Great Britain and Tunis it is declared that, if any slave of Tunis shall make his

If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.

Upon the expiration of the said fifteen days, or if a writ of *habeas corpus* is issued after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may, in his opinion, be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed, and for the person so authorised as aforesaid, to receive, hold in custody, and convey within the jurisdiction of such foreign State, the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on, or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or if a writ of *habeas corpus* is issued after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's superior courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

13. The warrant of the police magistrate issued in pursuance of this Act may be executed, in any part of the United Kingdom, in the same manner as if the same had been originally issued or subsequently endorsed by a Justice of the Peace having jurisdiction in the place where the same is executed.

14. Depositions or statements on oath taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

[Depositions duly authenticated are admissible in proceedings under the Act, though not taken in the presence of the accused nor on the particular charge. Conditions not required by that Act, but required by a treaty before initiating proceedings under the Act, cannot be taken into account in considering the validity of proceedings under the Act, if the magistrate in other respects had jurisdiction. (Re Counhay, 8 L.R. (Q.B.) 410, 1873.)]

15. Foreign warrants and depositions, or statements on oath and copies thereof, and certificates of, or judicial documents stating the fact



escape from thence, and get on board an English man-of-war, *the said slave shall be free*, and neither the English Consul nor any of his nation shall in any manner be questioned about the same.

of, a conviction, shall be deemed duly authenticated for the purpose of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows:—

(1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign State where the same was issued.

(2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign State, where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; and

(3) If the certificate of, or judicial document stating the fact of, conviction purports to be certified by a judge, magistrate, or officer of the foreign State where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of State; and all courts of justice, justices, and magistrates, shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

16. Where the crime, in respect of which the surrender of a fugitive criminal is sought, was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect:—

(1) This Act shall be construed as if any stipendiary magistrate in England or Ireland and any sheriff or sheriff's substitute in Scotland were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate.

(2) The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime.

(3) If the fugitive criminal is apprehended on a warrant issued without the order of the Secretary of State, he shall be brought before the stipendiary magistrate, sheriff, or sheriff's substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.

17. This Act when applied by order in council shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possessions were substituted for the United Kingdom or England, as the case may require, but with the following modifications, namely:—

(1) The requisition for the surrender of a fugitive criminal who is in, or suspected of being in, a British possession, may be made to the governor of that British possession by any person recognised by that governor as a consul-general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of which the requisition is made) as the governor of such colony or dependency.

(2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this Act by the police magistrate and the Secretary of State, or either

Elliot's Diplomatic Code contains Treaties between the United States and the Slave States. By the Treaty of 1786 between the United States and the Emperor of Morocco, it

of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone.

(3) Any prison in the British possession may be substituted for a prison in Middlesex.

(4) A judge of any court exercising in the British possession the like powers as the court of Queen's Bench exercises in England may exercise the power of discharging a criminal, when not conveyed within two months out of such British possession.

18. If by any law or ordinance made before or after the passing of this Act by the legislature of any British possession provision is made for carrying into effect, within such possession, the surrender of fugitive criminals who are in, or suspected of being in, such British possession, Her Majesty may, by the order in council applying this Act in the case of any foreign State or by any subsequent order, either suspend the operation within any such British possession of this Act or of any part thereof, so far as it relates to such foreign State, and so long as such law or ordinance continues in force there, and no longer; or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

19. Where, in pursuance of any arrangements with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act, is surrendered by that foreign State, such person shall not until he has been restored, or had an opportunity of returning to such foreign State, be triable or tried for an offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

[It was decided by the Circuit Court of the City of New York that the extradition treaty of 1842 between England and the United States does not provide that a person extradited shall not be tried for an offence other than that for which he is extradited. The statutes of the United States passed in 1848 and 1869 in relation to extradited criminals do not give such a construction to the treaty. If the English statute of 1870 is held in England to give such a construction to the treaty (which the Court doubted), yet that statute cannot be held to have had that effect in the United States, nor can that statute be held to have been such a modification of the treaty of 1842 that the failure of the Government of the United States thereupon, to give notice of the abrogation of the treaty, can be held to have been an assent by that Government to such modification. Nor can an agreement entered into between the representatives of the two Governments in any case before the extradition, as to the offences for which an extradited person should be tried, have the effect of depriving the Court of jurisdiction to try him for other offences. The effect of such an agreement is a question for the executive, and not the judicial department of the Government. (*The United States v. Lawrence, Mar. term, 1876.*) See also *Heilbronn case*, 12 *New York Legal Obs.* 65; *Caldwell's case*, 8 *Blatchf. R.* 131; *Adrianse v. Logrove*, 59 *New York R.* 115; *Bouvier's case*, 27 *L. T. Rep. U. S.* 844; *Scott's case*, 9 *B. & C.* 447.

In the case of Winslow and Brent, American subjects, whose extradition was asked by the United States in 1876, the British Govern-



is declared that 'if any ship of war belonging to the United States shall put into any of our ports, *she shall not be examined on any pretence whatever, even though she should have any*

ment required the United States Government to pledge themselves that the prisoners should be tried upon no other charge save on that one for which they were to be extradited. On the refusal of the United States to do so, the prisoners were discharged from custody. Fears were entertained that all extradition would cease between the two countries. The matter was argued in the House of Lords, and Lord Selborne declared himself in favour of the view adopted by the United States, for the question was governed by the treaty of 1842, and there was no reason why an extradited person should not be tried for an offence other than that for which he had been extradited, political offenders excepted. The Act of 1870 contained words to prevent this, but no Act of Parliament could introduce into a treaty a condition that it did not contain. Eventually the British Government acquiesced in this view, and Brent was re-arrested and extradited to the United States.]

20. The forms set forth in the second schedule to this act or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and in the case of a British possession may be so used, *mutatis mutandis*, and when used shall be deemed to be valid and sufficient in law.

21. Her Majesty may by order in council revoke or alter, subject to the restrictions of this act, any order in council made in pursuance of this act and all the provisions of this act with respect to the original order shall (so far as applicable) apply, *mutatis mutandis*, to any such new order.

22. This act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and the Isle of Man in the same manner as if they were part of the United Kingdom, and the royal courts of the Channel Islands are hereby respectively authorised and required to register this act.

23. Nothing in this act shall affect the lawful powers of Her Majesty, or of the Governor-General of India in council, to make treaties for the extradition of criminals with Indian native States, or with other Asiatic States conterminous with British India, or to carry into execution the provisions of any such treaties made either before or after passing this act.

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign State, in like manner as it may be obtained in relation to any civil matter under the act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, ch. 113, intituled, 'An Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals,' and all the provisions of that act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal, provided that nothing in this section shall apply in the case of any criminal matter of a political character.

25. For the purposes of this act, every colony, dependency, and constituent part of a foreign State, and every vessel of that State, shall (except where expressly mentioned as distinct in this act) be deemed to be within the jurisdiction of and to be part of such foreign State.

26. In this act, unless the context otherwise requires,—  
The term 'British possession' means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within

fugitive slaves on board, nor shall the Governor or Commander of the place compel them to be brought on shore on any pretext whatever.' And by the Treaty of 1815, between

the United Kingdom, the Channel Islands, and Isle of Man: and all colonies, plantations, islands, territories, and settlements under one legislature as hereinafter defined are deemed to be one British possession.

The term 'legislature' means any person or persons who can exercise legislative authority in a British possession, and where there are local legislatures as well as a central legislature, means the central legislature only.

The term 'governor' means any person or persons administering the government of a British possession, and includes the governor of any part of India.

The term 'extradition crime' means a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this act.

The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy.

The term 'fugitive criminal' means any person accused or convicted of any extradition crime committed within the jurisdiction of any foreign State who is in, or is suspected of being in, some part of Her Majesty's dominions; and the term 'fugitive criminal of a foreign State' means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that State.

The term 'secretary of State' means one of Her Majesty's principal secretaries of State.

The term 'police magistrate' means a chief magistrate of the Metropolitan police courts, or one of the other magistrates of the Metropolitan police court in Bow Street.

The term 'justice of the peace' includes in Scotland any sheriff, sheriff's substitute, or magistrate.

The term 'warrant' in the case of any foreign State includes any judicial documents authorising the arrest of a person accused or convicted of crime.

27. The [6 and 7 Vict. cc. 75, 76; 8 and 9 Vict. c. 120; 25 and 26 Vict. c. 70; and 29 and 30 Vict. c. 121,] are hereby repealed as to the whole of Her Majesty's dominions: and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign States with which those treaties are made, in the same manner as if an order in council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance, which is in force in any British possession with respect to such treaties, should have effect as part of this Act.

Provided that if any proceedings for, or in relation to, the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed and the fugitive surrendered in the same manner as if this Act had not passed.

First Schedule.—The following list of crimes is to be construed according to the law existing in England or in a British possession, as the case may be, at the date of the alleged crime, whether by common law or by statute made before or after passing of this act:—

Murder, and attempt and conspiracy to murder.  
Manslaughter.



the United States and the Dey of Algiers, it is further declared that 'on a vessel or vessels of war belonging to the United States anchoring before the city of Algiers, the Consul

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force.

Rape.

Abduction.

Child-stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

The following Act was passed in 1873 :—36 & 37 Vict. c. 60. An Act to amend the Extradition Act 1870.

Be it enacted as follows :—

1. This act shall be construed as one with 'The Extradition Act 1870' (in this act referred to as the principal act) and the principal act and this act may be cited together as the 'Extradition Acts 1870 and 1873,' and this act may be cited alone as the 'Extradition Act 1873.'

2. Whereas by section six of the principal act it is enacted as follows :—  
'Where this act applies in the case of any foreign State, every fugitive criminal of that State who is in, or suspected of being in, any part of Her Majesty's dominions, or that part which is specified in the order applying this act (as the case may be), shall be liable to be apprehended and surrendered in manner provided in this act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.'

And whereas doubts have arisen as to the application of the said section to crimes committed before the passing of the principal act, and it is expedient to remove such doubts, it is therefore hereby declared that :—

A crime committed before the date of the order includes in the said section a crime committed before the passing of the principal act, and the principal act and this act shall be construed accordingly.

3. Whereas a person who is accessory before or after the fact, or counsels, procures, commands, aids, or abets the commission of any indictable offence, is by English law liable to be tried and punished as if he were the principal offender, but doubts have arisen whether such persons as well as the principal offender can be surrendered under the principal act, and it is expedient to remove such doubts : it is therefore hereby declared that :—

is to inform the Dey of her arrival, when she shall receive the salutes which are by treaty or custom given to the ships of the most favoured nations on similar occasions, and which

Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal act, and this act, to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

4. Be it declared that the provisions of the principal act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State and copies of such affirmations.

5. A secretary of State may by order under his hand and seal require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign State : and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken, that such evidence was taken before him, and shall transmit the same to the secretary of State ; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled for the purposes of this section to attend and give evidence, and answer questions, and produce documents in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

6. The jurisdiction conferred by section sixteen of the principal act on a stipendiary magistrate and a sheriff or sheriff's substitute shall be deemed to be in addition to, and not in derogation or exclusion of, the jurisdiction of the police magistrate.

7. For the purposes of the principal act and this act a diplomatic representative of a foreign State shall be deemed to include any person recognised by the secretary of State as a consul-general of that State, and a consul or vice-consul shall be deemed to include any person recognised by the governor of a British possession as a consular officer of a foreign State.

8. The principal act shall be construed as if there were included in the first schedule to that act the list of crimes contained in the schedule to this act.

SCHEDULE.—The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this act :—

Kidnapping and false imprisonment.

Perjury and subornation of perjury, whether under common or statute law.



shall be returned gun for gun: and if after such arrival so announced any Christians whatsoever, captives in Algiers, make their escape and take refuge on board any of the ships of war, *they shall not be required back again*, nor shall the Consuls of the United States or commanders of the said ships be required to pay anything for the said Christians.']

Any indictable offence under the 24 & 25 Vict. cc. 96, 97, 98, 99, 100, or any act amending or substituted for any of the same respectively.

Any indictable offence under the laws for the time being in force in relation to bankruptcy.

By the Hong Kong Ordinance, No. 2, of 1850, where it appears to a magistrate or court that there is probable cause for believing that a Chinese, who has taken refuge at Hong Kong, has committed 'any crime or offence against the laws of China,' he may be imprisoned with a view to his being surrendered to the Government of China.

It was held by the Privy Council on appeal from the Supreme Court of Hong Kong that the words 'crime or offence' must be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China, such as murder, robbery, theft, or arson committed by a Chinese within Chinese territory or in Chinese ships on the high seas; piracy, moreover, in certain circumstances would come within the Ordinance, as for example, if a Chinese went from the Chinese coasts to plunder ships at sea returning again to China with his plunder. Where a Chinese, who had taken refuge in Hong Kong, was accused of having previously murdered a French captain of a French ship at sea, it was held that he could not be imprisoned and delivered up to the Chinese Government under the Ordinance, on two grounds—1. That it could not be assumed without evidence that there was any law in China to punish a Chinese subject for murder committed upon a foreigner within foreign territory, and 2. That even if it could be assumed, still the offence having been committed within French territory ought to be treated as an offence against French, and not an offence against Chinese law.

Chinese coolies who were being taken from China to Peru in a French ship killed the captain and several of the French crew, and then took the ship back to China. They were held to have been guilty of piracy *jure gentium*. But the piracy was held not to be an offence against the law of China within the meaning of the Ordinance; if they committed an act against the municipal law of any nation it was against that of France: and if they were punishable by the law of China it was only because they had committed an act of piracy which *jure gentium* is justiciable everywhere. Attorney-General of Hong Kong *v.* Kwok-a-Sing, 5 *L. R. (P. C.)* 179.

## CHAPTER VIII.

## RIGHTS OF LEGATION AND TREATY.

1. Right of legation an essential attribute of sovereignty—2. Of semi-sovereign and dependent States—3. This right, how affected by civil war—4. Refusal to receive particular persons—5. Conditional reception of a diplomatic agent—6. What department of government may send and receive such agents—7. On diplomacy and the art of negotiation—8. Right of negotiation and treaty—9. Martens on European treaties—10. Treaties by semi-sovereign and dependent States—11. Treaty-making power of a State—12. Treaties, in general, to be ratified—13. Exception in cases of truces, &c.—14. Sponsions and their ratification—15. Legislation necessary to carry them into effect—16. Constitution of the United States on this subject—17. Treaty with France in 1831—18. Treaty with Great Britain in 1824—19. Auxiliary legislation in United States and Great Britain—20. Real and personal treaties—21. Other divisions of treaties—22. Equal and unequal treaties—23. Treaties of guarantee and surety—24. Treaties of confederation and association—25. Treaties of alliance, of succour and subsidy—26. Treaties of amity or friendship—27. Treaties of commerce, of boundaries, of cession—28. Violation of the faith of treaties, how punished—29. Use of an oath or asseveration—30. Conditions to make a treaty binding—31. Attempts of the Popes to annul the obligation of treaties—32. Guarantees and securities—33. Duration of guarantees and withdrawal of pledges—34. Dissolution and termination of treaties—35. Effect of loss of sovereignty—36. Debts previously contracted—37. Remarks of Kent and Wheaton on the interpretation of treaties—38. Rules of Grotius—39. Of Vattel—40. Collision of stipulations—41. Rules of Rutherford—42. Of Paley—43. Minute rules of other writers—44. Objections to arbitrary formulæ—45. Importance of well-established principles.

§ 1. ANOTHER essential attribute of sovereignty is *the right of legation and treaty*. Legation consists in sending diplomatic agents to other States, and in receiving such as are sent by them. This right of an independent sovereign State to send and receive diplomatic agents, is regarded, in international law, as a *perfect* one; but the obligation to do so is deemed *imperfect*, for, strictly speaking, no State can be compelled either to send or to receive such agents.<sup>1</sup> Nevertheless, usage and comity have established a sort of reciprocal duty in this

<sup>1</sup> For treaties with China and Japan, see *post*, ch. xi. §§ 24-34.



respect. The maintenance of permanent diplomatic missions between different States is regarded as evidence of a mutual desire to continue the relations of peace and amity. On the contrary, a refusal to establish such means of diplomatic intercourse, or a discontinuance of them when once established, is, in most cases, regarded as an indication of unfriendly feeling, or, at least, of an indisposition to cultivate amicable relations. This, however, will depend very much upon the nature and importance of the relations between the States, and their ability to maintain permanent diplomatic missions. If two States be so situated that they can have very little commercial or political intercourse, such missions would be unnecessary. Moreover the smaller States can hardly be expected to bear the burthen of the expense of maintaining them with all other States.<sup>1</sup>

§ 2. How far the rights of legation belong to a semi-sovereign or dependent State, must depend upon its relations to the superior with which it is connected or under whose protection it is placed. Its sovereignty not being complete, it may, or may not, be entitled to a right incident to sovereignty, according to the nature and circumstances of the case. Thus, by the constitution of the United States of America, every State is expressly forbidden from entering, without the consent of congress, into any agreement or compact with another State, or with a foreign power, and their original power of sending and receiving public ministers is essentially modified, if not entirely taken away, by this prohibition. Under the constitution of the German Empire, and the Germanic Confederation,<sup>2</sup> of the Swiss Confederation, and of the former United Provinces of the low countries, the right of legation was preserved by the princes and States composing these unions.<sup>3</sup>

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 2; Vattel, *Droit des Gens*, liv. iv. ch. v. §§ 55-65; Real, *Science du Gouvernement*, tome v. p. 140; Rousset, *Ceremonial Diplom.*, tome ii. p. 481; Riquelme, *Derecho Pub. Int.*, lib. ii. tit. ii. cap. Ad. 1; Horne, *On Diplomacy*, sec. i. §§ 5, 6; Wicquefort, *L'Ambassadeur et ses fonctions*, liv. i. ch. iii; Rutherforth, *Institutes*, b. iii. ch. ix. § 20; Martens, *Précis du Droit des Gens*, §§ 185-190; Polson, *Law of Nations*, § 5; Phillimore, *On Int. Law*, vol. ii. § 114; Ompteda, *Litteratur des Völkerrechts*, vol. ii. p. 351; Martens, *Guide Diplomatique*, § 5; Bowyer, *Universal Public Law*, ch. xx.; Bello, *Derecho Internacional*, pt. iii. cap. i. § 2; Heffter, *Droit International*, § 200.

<sup>2</sup> This does not refer to the present German Empire.

<sup>3</sup> Kluber, *Droit des Gens Mod.*, pt. ii. tit. ii. ch. iii. § 175; Merlin, *Répertoire*, verb. 'Ministre Public,' sec. ii. § 6.

§ 3. Strictly speaking, every State has the exclusive right to determine in whom its sovereign authority is vested. Nevertheless, in case of a revolution or civil war, foreign States must, of necessity, judge for themselves whether they will continue their accustomed diplomatic relations with the former government, or commence them with the revolutionary party. This is sometimes a question of great delicacy, and in order to avoid any positive decision of it, diplomatic intercourse is either entirely suspended until the final termination of the contest, or is partially kept up by means of diplomatic agents, of special and limited authority, who are not vested with full ministerial powers, nor entitled to diplomatic honours. But where the accustomed diplomatic relations are to be maintained, the safest and least objectionable rule is, to continue them with the *de facto* government, whatever that may be, because, for the time being, that may properly be regarded as representing the sovereignty of the State.

§ 4. As a State is not under a perfect obligation to receive diplomatic agents from another, it may refuse to receive any particular individual, either on the ground of personal character, or of the authority conferred upon him. Thus, in France, where the legates or nuncios of the pope were the bearers of powers which were deemed incompatible with the constitution and laws of the State, it was deemed proper to refuse to receive such agents until their powers were reduced to reasonable limits.<sup>1</sup> Again, the reception of a foreign diplomatic agent has sometimes been refused on the ground of personal character, or known hostility to the sovereign, or the State to which he is sent. Indeed, the sending of a person in a diplomatic capacity, who is known to be odious or objectionable to the court to which he is accredited, if not a direct insult, is certainly far from being an evidence of friendly intentions, or of a desire to maintain friendly relations. But when a diplomatic agent is once received, he is entitled to all the privileges, immunities, and honours annexed by the law of nations to his

<sup>1</sup> There are no diplomatic relations between Great Britain and the Pope. However, it was enacted in 1848: 'That notwithstanding anything contained in any Act or Acts now in force, it shall be lawful for Her Majesty, her heirs and successors, to establish and maintain diplomatic relations and to hold diplomatic intercourse with the sovereign of the Roman States.' The statute contains some qualifications as to the non-ecclesiastical character of the envoy (11 and 12 Vict. c. 108).



public character, except where modified by special conditions attached to his reception.<sup>1</sup>

5. Some governments have established, as a fundamental rule in their diplomatic intercourse with other States, that they will not receive one of their own native subjects as a minister from a foreign power; others again refuse to receive one of their own subjects in any diplomatic capacity, except on condition that he shall be amenable to the local laws and local jurisdiction. Where the reception is refused, it is proper that the motives or grounds of the refusal be alleged; and where conditions are annexed, they must be *expressed* before or at the time of the reception, for, otherwise, the agent is entitled to claim the full rights and honours annexed to the office which he fills. There are no tacit or implied conditions in such receptions which can modify or limit the public character in which he is received, and with which he was accredited by the sovereign State which sent him.<sup>2</sup>

<sup>1</sup> Bynkershoek, *De Foro Legat.*, cap. xi. § 10; Moser, *Versuch*, b. iii. p. 89; Wildman, *Int. Law*, vol. i. pp. 83 et seq. The question has often been raised whether a Christian State can enter into a valid treaty with an Infidel nation. Grotius, however, says that, according to the law of nature, there can be no doubt of the validity of such treaty (*lib. ii. c. xv. 8*). A Pirate is not an *enemy* in the true sense of the word, although he is termed *hostis humani generis*. Some pirates reduced themselves into a Government or State, as did those of Tunis, Tripoli, and Algiers. They acknowledged the supremacy of the Porte, although that Government had little or no control over them. When Louis IX. of France attempted to destroy these pirates, he summoned a council of war to determine whether it was fit that the then solemn ceremonies of declaring war should be lavished on a company of thieves and pirates. The answer was unanimously in the negative (Fuller, *Holy War*, lib. iv. ch. xxvii.). Yet because these pirates acknowledged the supremacy of the Porte and had become a sort of State, some contended that they should receive a notification of war. However, in the reign of Charles II., if not earlier, some obtained the right of legation, for a formal peace was concluded between Sir John Lawson in the name of His Majesty and 'the most excellent signiors Mahomet Bashaw, the Divan of the noble city of Tunis, Hagge Mustapha Dei, Morat Bei, and the rest of the soldiers in the kingdom of Tunis,' October 5, 1662. This was confirmed by the Porte 'the last day of the Moon Delcadi and the year of Hegira, 1085.' Similar articles were concluded with Tripoli and Algiers, and confirmed in like manner.

<sup>2</sup> Garden, *De la Diplomatie*, liv. v. § 2. An English subject may not act as a diplomatic agent in England—*Case of Dr. Stewart*, House of Commons, June 2, 1871. A nation may refuse to receive one of its citizens as the representative of a foreign Power, and in some countries it is a State maxim that a subject is not to be received in such a capacity. Such was the rule in the French (De Caillères, *Traité de la manière de négocier avec les souverains*, ch. vi. p. 72) and Swedish courts (*Codex Legum Suecicæ*, tit. 'de Crimin.' § 7), and likewise of the United Provinces

§ 6. The question, with respect to what department of the government belongs the right of sending and receiving diplomatic agents, depends upon the municipal constitution of the State. In monarchical governments, this prerogative usually resides in the sovereign ; in republics, it is generally vested in the chief executive, or in the President and his counsel, or the senate, conjointly. In the United States of America, the President alone receives a foreign minister, and the appointment of a minister to a foreign court is made by the President, with the advice and consent of the senate. In monarchical countries there is also a distinction sometimes made in the rank of the representatives of a foreign State, with respect to the department of government which is to receive them, those of the highest rank being received by the sovereign, and those of a lower grade by the secretary, or minister of foreign affairs. But this subject will be more particularly discussed in another place.

§ 7. Many publicists have written at considerable length on the art of diplomacy, and some seem to have based their remarks on the idea that a peculiar tact, finesse, or talent for deception, not required, or even allowed, in other professions, was absolutely necessary to successful negotiation. Indeed, in the diplomacy of the middle ages, it was proclaimed, as a maxim of the art, that 'dissimulation must be met by dissimulation, and falsehood by falsehood,' and, at even later periods, and in the most refined courts of Europe, bribery, gallantry, and intrigue were regarded as the most effective arguments in the discussion of diplomatic questions. But such disreputable means of negotiation are now seldom resorted to, and the most able diplomatists of the present age are men as much distinguished for their exalted personal character and unimpeachable integrity, as for their talents and learning. While a knowledge of the rules of diplomacy, and of the laws regulating the international rights and duties of States, are absolutely indispensable in a public minister, it may be remarked, that good manners and good temper

(Bynkershoek, *de Foro Legat.*, ch. ii.). But in recent times two French subjects have been accredited to, and received by, the French court as the representative ministers of foreign Powers—Count Pozzo di Borgo as minister of Russia, and the Count de Bray as minister of Bavaria. Martens speaks of them as having been naturalised in the countries which they represented (Sir Travers Twiss, *Law of Nations*, ch. ii. p. 276).



seem peculiarly necessary in an officer so intimately connected with the etiquette of polite society and ceremonies of courts.<sup>1</sup>

§ 8. The right of a State to negotiate and contract public treaties with other nations, is, like the right of legation, a necessary incident to its sovereignty. This power exists in full vigour in every State which has not parted with this portion of its natural sovereignty, or has not agreed to modify its exercise by some compact with other States. Sovereign and independent States are sometimes restricted in their power to make new treaties by the conditions of alliances already formed with others. Such limitation affects the *exercise* of the power of negotiating treaties, but is not regarded as a modification of the *power* itself. But if, by alliance or otherwise, a State has parted with its general power to negotiate treaties and to contract obligations, it can no longer be regarded as completely sovereign and independent. It has lost one of the essential attributes of sovereignty.<sup>2</sup>

§ 9. Martens admits that, in theory, every sovereign State has a right to form, with other powers, whatever treaties may appear to be conducive to its interests, provided such treaties do not violate the equal rights of others; but, he adds, the general practice of Europe has been very different, many of the smaller States, nominally sovereign and independent, being forced, against their will, to accede to treaties in the formation of which they were not even consulted. He gives a number of examples to prove the truth of his statement. There are, no doubt, numerous instances in the history of Europe where the well-established principles of international law have been violated, and many States, *nominally* sovereign and independent, are really mere dependencies of their more powerful neighbours. But these exceptions do not affect the general rule, and we do not understand them to be stated by Martens with any such object, but rather as instances of the abuse of power. The severe criticisms of Pinheiro-Ferreira on this part of Martens's work, are therefore uncalled for, if not unjust.<sup>3</sup>

<sup>1</sup> Flassan, *De la Diplomatie*, tome i. pp. 235, 246, 247; Machiavelli, *Il Principe discorsi* 2; Mably, *Droit des Gens*, tome i. pp. 15 et seq.

<sup>2</sup> *Vide ante*, ch. iii.

<sup>3</sup> Martens, *Précis du Droit des Gens*, § 119; Pinheiro-Ferreira, *Notes sur Martens*, No. 63; Martens, *Recueil des Traités*, tome v. p. 222.

§ 10. The right of semi-sovereign and dependent States to contract, by treaty, is, like their right of legation, to be determined by the nature of their connection with, or dependence on, others. We have already shown that a colony, or ordinary dependency, is a part of a State, but cannot itself be regarded as a distinct political organisation, possessing the essential attributes of a State; that the mere fact of dependence, or of feudal vassalage and the payment of tribute, or of occasional obedience, or of habitual influence, does not destroy, although it may greatly impair, the sovereignty of the States so situated. We have also shown the effects of a protectorate, of a confederation, and of a union, upon the sovereignty of the protected, confederated, and united States. The powers of such States to contract, by treaty, will necessarily depend upon the character of the relations thus formed with others. Thus, the sovereign members of the Germanic confederation<sup>1</sup> could each make treaties of alliance and commerce, not inconsistent with the fundamental laws of the confederation; while in the Swiss confederation, as remodelled by the federal pact of 1815,<sup>2</sup> the diet, consisting of one deputy from each of the twenty-two cantons, had the exclusive power of concluding treaties of peace, alliance and commerce with foreign powers. Again, the several States, constituting the United States of America, are expressly prohibited by the federal constitution from entering into any treaty, agreement or compact with foreign powers, without the consent of the federal congress. A foreign power, treating with a semi-sovereign, dependent or confederated State, is bound to know how far such State is capable of contracting obligations by treaty. If it contract with a State incapable of entering into such engagements, the treaty is necessarily invalid.<sup>3</sup>

<sup>1</sup> Not the present Empire.

<sup>2</sup> In July 1848 a new Federal constitution for the twenty-two cantons forming the Swiss confederation—viz., Zurich, Berne, Lucerne, Uri, Schwitz, Unterwalden, Glaris, Zug, Friburg, Soleure, Bâle, Schaffhouse, Appenzell, St. Gall, Grisons, Argovie, Thurgovie, Tessin, Vaud, Valais, Neuchâtel, and Geneva—was declared. In this constitution each canton preserved the right of concluding any treaty with foreign States on subjects of public economy and on matters relating to its frontier and to police, provided that such treaty in nowise interfered with the confederation or the rights of the other cantons.

<sup>3</sup> Pando, *Derecho Internacional*, pt. iii. cap. i. § 2; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. xv; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii.



§ 11. The treaty-making power of a State is determined by its own constitution, or fundamental law. In monarchical governments it is usually vested in the reigning sovereign, sometimes, however, subject to restrictions. In republics it is usually vested in the chief executive, either alone or conjointly with a council or senate. By the constitution of the United States of America, the President has power, by and with the advice and consent of the senate, to make treaties, provided that two-thirds of the senators present concur. This power is general, and, of course, embraces all sorts of treaties, for peace or war. The President has, therefore, no power to terminate a war by a treaty of peace, without the concurrence of two-thirds of the senators present. This, however, does not prevent his entering into a truce with any enemy for the suspension of hostilities. That power results from his office as commander-in-chief of the army and navy of the United States. Military conventions, as shown hereafter, form a part of the *commercium belli*, and do not require the treaty-making power of the State, either for their negotiation or ratification.

§ 12. The question, how far, under the positive law of nations, ratification by the State in whose name the treaty is made, by its duly authorised minister or diplomatic agent, furnished with full power, is essential to the validity of the treaty, was at one time the subject of much doubt and discussion. But it is now the settled usage to require such ratification, even where this pre-requisite is not reserved by the express terms of the treaty itself. The municipal constitution of the State determines in whom the power of ratification resides. By the constitution of the United States of America, treaties are negotiated and concluded under the authority of the President, but the advice and consent of the senate is essential to enable him to pledge the national faith, by making a treaty the supreme law of the land.<sup>1</sup>

§ 13. There are, however, certain compacts or conventions relating to the pacific intercourse of belligerent nations which may be concluded, not in virtue of any special autho-

§ 1; Vattel, *Droit des Gens*, liv. ii. ch. xii. § 55; *Constitution of the United States*, art. i. sec. 10; Story, *Com. on the Constitution*, §§ 1347 et seq.

<sup>1</sup> Klüber, *Droit des Gens Mod.*, § 48.

ity vested by the State in its agents, but in the exercise of a general implied power incidental to their official stations, such as the official acts of generals, and admirals suspending hostilities within the limits of their respective commands, truces, capitulations, cartels for the exchange of prisoners, special licences to trade, ransom of captured property, etc. Such compacts do not, in general, require the ratification of the supreme power of the State, unless such ratification be expressly reserved in the act itself. These will be more particularly discussed in another place.<sup>1</sup>

§ 14. But sometimes compacts or engagements of this kind are made by officers without proper authority, or exceeding the limits of the authority under which they purport to be made, as, for example, a truce for the suspension of arms beyond the limits of the command of the general who makes it. Such acts are called *sponsions*,<sup>2</sup> and must be confirmed by express or tacit ratification to make them binding. The former is given in positive terms and with the usual forms; the latter is implied, from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient, though good faith requires that the party who refuses its ratification, should notify the other without undue delay; and if, in the meantime, the ratifying party, acting in good faith upon the supposition of the due authority of the agent, should have totally or partially performed his part of the agreement, he is entitled to be indemnified or replaced in his former position.<sup>3</sup>

§ 15. The question has sometimes been discussed, whether a treaty, duly ratified, is obligatory upon the contracting parties, independently of the auxiliary legislation necessary to carry it into complete effect. This will depend, in a measure, upon the limitations upon the treaty-making power expressed in the constitution, or fundamental laws of the State. A general power to make and ratify treaties, necessarily implies

<sup>1</sup> *Vide post*, ch. xxix. Bello, *Derecho Internacional*, pt. i. cap. ix. § 4; Grotius, *De Jur. Bel. ac Pac.*, lib. iii. cap. xxii. §§ 6-8; Polson, *Law of Nations*, sec. v. A truce is not a peace. The war continues, but the *acts of war* are suspended. Truces have been made between States equal in power. Thus formerly Spain and Portugal made truces, in order that they might waive no rights by making a peace.

<sup>2</sup> Otherwise called treaties *sub spe rati*. See on this subject, 'The Hope,' 1 *Dods*. 230.

<sup>3</sup> Rutherforth, *Institutes*, b. ii. ch. ix. § 21.



the power to determine the terms upon which they shall be made; but the municipal constitution of a State may have limited this power, by prohibiting it from making engagements of a certain character, without the joint action of the legislative department of the government. This limitation, where not expressed in the fundamental laws of the State, is sometimes necessarily implied in the distribution of powers to its constitutional authorities. Commercial treaties, for example, which have the effect of changing the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each State for their execution. In such cases it is usual to stipulate in the treaty, that it shall not be binding till the proper laws are passed for carrying it into effect. Thus, the commercial treaty of Utrecht, between France and Great Britain, was never carried into effect, the British parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of that treaty. So, also, where an appropriation of money is required by the terms of the treaty, and which can be made only by the legislative power, it may be stipulated in the treaty itself that it shall be held subject to the making of the necessary appropriation for that purpose. But where the treaty is made, and ratified by competent authority, with no express or implied limitations in the treaty-making power, it is considered obligatory upon the contracting parties, and it is the duty of the legislative power of the State to pass the laws, and to make the appropriations necessary to carry it into complete effect.<sup>1</sup>

§ 16. By the constitution of the United States, treaties made and ratified by the President, with the advice and consent of the senate, are declared to be 'the supreme law of the land,' and it seems to be understood that congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry their stipulations into effect. It is true that their execution is dependent upon such auxiliary legislation, but it is, nevertheless, the duty of every department of government to assist in performing all the obligations properly incurred by the whole State. This question has been frequently discussed in the legislative halls of con-

<sup>1</sup> Lord Mahon, *Hist. of England*, vol. i. p. 24.

gress. It especially came under the consideration of the house of representatives in 1796, with respect to the treaty of 1794 with Great Britain; in 1816, on the commercial convention with the same power; in 1842-3, with respect to the treaty of Washington; and in 1853-4, with respect to the convention with Mexico. In each and every one of these cases the necessary appropriations were made for carrying into effect treaties duly entered into by the President and the senate. If, when a treaty, duly entered into by the President, and ratified by the senate, comes before the house of representatives, that body were to proceed to discuss and examine it as an act of ordinary legislation, and, at its pleasure, grant or refuse the requisite appropriation for carrying it into effect, it would virtually annul the present constitutional provisions with respect to treaties, and make that body a branch of the treaty-making power.

§ 17. That the omission of congress to pass the necessary acts for carrying a treaty into effect, would be no answer to a foreign government for the non-fulfilment of treaty stipulations, is to be deduced from the ground taken by the United States with France, when the legislative power of the latter State refused to vote the moneys required by the convention of 1831, by which indemnities were provided for the spoliation on American commerce. With respect to this controversy, Mr. Wheaton said: 'Neither government has anything to do with the auxiliary legislative measures necessary, on the part of the other State, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature, but it might have been on the part of the judicial department. The court of cassation might have refused to render some judgment necessary to give effect to the treaty. The king cannot compel the chambers, neither can he compel the courts; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution.'<sup>1</sup>

<sup>1</sup> *Pinkney, Life of*, by Wheaton, pp. 517-549; Kent, *Com. on Am. Law*, vol. i. p. 285; Story, *On the Constitution*, § 1502; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 7, note; *President's Message*, Dec., 1834; *Annual Register*, 1834, p. 361.



§ 18. This case is broadly distinguished from that of the convention entered into between Mr. Rush, on the part of the United States, and Mr. Canning, on the part of Great Britain, in 1824, with respect to a mutual right of search of vessels suspected of being engaged in the slave trade. The senate ratified the treaty, with an amendment exempting the coasts of the United States from the *surveillance* of the cruisers of a foreign power. Mr. Canning refused to ratify the treaty as amended, mainly on the ground that the senate could not introduce any change into a treaty negotiated according to the President's instructions. It will probably be admitted, on all hands, at the present day, that Mr. Canning's objection to the action of the senate was without foundation. No treaty is binding till duly ratified, and it was his duty to know that, by the constitution of the United States, that power was vested in the senate, and the exercise of the power so vested could not be a matter of complaint by a foreign State. If, as in the case of France, in 1831, the convention of March 13th, 1824, had been duly ratified by the treaty-making power of the United States, and either the executive, legislative, or judicial branch of that government had refused or neglected to take the proper measures for carrying it into effect, Mr. Canning would have had good cause of complaint.<sup>1</sup>

§ 19. How far auxiliary legislation may be necessary to carry into effect the stipulations of treaties, must depend, in a measure, upon the particular constitution of each State. The doctrine of the British constitution, as stated by Blackstone, is, that 'whatever contracts the king engages in, no other power in the kingdom can legally delay, resist, or annul.' Nevertheless, the treaty binds nobody till its provisions are enacted by law, and a treaty cannot be pleaded in the courts against an act of parliament. In the United States, the constitution declares a treaty to be 'the supreme law of the land.' It is, therefore, regarded by the courts as equivalent to an act of congress, wherever it operates *proprio vigore*, without the necessity of legislative provisions; and, as such, all concerned are bound to obey it, and, within their competence, to exe-

<sup>1</sup> Webster, *Off. and Dip. Papers*, pref., pp. 18-19; *American State Papers*, 1824; Holmes, *Annals of America*, vol. ii. p. 506; Lawrence, *On Visitation and Search*, p. 28; *Cong. Doc.*, 18 Cong., 2nd Sess., Doc. No. 2; Hansard, *Parl. Debates (N.S.)*, vol. xi. p. 1; *Annual Register*, 1824, p. 119.

cute it. Any law conflicting with a treaty would be declared by our courts as unconstitutional. But when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, rather than the judicial, department of the government, and the legislature must execute the contract, before it can become a rule for the court. Congress, though it cannot be compelled by any other branch of the government to pass the law for that purpose, is bound, by the highest moral and political obligations, so to do; and, in point of fact, it has rarely hesitated, and never omitted, to do its duty in this respect.<sup>1</sup>

§ 20. General compacts between nations have been variously divided by text-writers. One of the most important of these divisions is into *personal* and *real* treaties; the first including only treaties of mere personal alliance, such as are expressly made with a view to the person of the reigning sovereign or his family, and the latter relating only to the things of which they treat, without any dependence on the person of the contracting parties. The first bind the State during the existence of the persons referred to, or their public connection with the State, but expire with the natural life or public authority of those who contract them, while the latter bind the contracting parties independently of any change in the constitution or rulers of the State. *Real* treaties include those made for a determinate time, as well as those which are, from their nature, perpetual.

§ 21. There are numerous other divisions of treaties which have been made with respect to their object or general character, as *equal* and *unequal* treaties; treaties of *guarantee* and *surety*; treaties of *confederation* and *association*; treaties of *alliance* and of *succour* and *subsidy*; treaties of *cession*, of *boundaries*, of *friendship*, of *commerce*, of *arbitration*, etc. The character and duration of these several kinds of treaties are very different. It not unfrequently happens, however, that the same treaty relates to various things, and that some of its articles are perpetual, while others have reference only to past transactions, or are for a temporary object, and continue only

<sup>1</sup> Foster, et al. *v.* Neilson, 2 *Peters. Rep.*, p. 314; United States *v.* Arrondona, 6 *Peters. Rep.*, 735; Blackstone, *Commentaries*, vol. i. p. 257; Polson, *Law of Nations*, sec. 5.



for a determinate time. It is, therefore, necessary to distinguish the character of the engagements, rather than the nature of the things to which they relate. Thus, stipulations with respect to boundaries, cession or exchange of territory, to public debts, to the tenure of property by each other's subjects, are permanent in their nature, and, although their operation may, in some cases, be suspended during war, they revive on the return of peace, unless expressly abrogated or altered. Other stipulations entirely cease on the declaration of war, and require a new treaty to revive them.<sup>1</sup>

§ 22. Treaties are sometimes divided by publicists into *equal* and *unequal*. *Equal* treaties are where the contracting parties promise the same or equivalent things; and *unequal* treaties, are where the things promised are neither the same nor equitably proportioned. These different classes of engagements are sometimes spoken of as *bilateral* and *unilateral*. The latter, however, are more properly applied to treaties where promises are made by only one party, without any corresponding engagements, either equal or unequal, by the other. Equal and unequal treaties are to be distinguished from equal and unequal alliances, the latter division having reference to the equality or difference in the rank or dignity of the contracting parties, rather than the character of the engagements entered into. Thus, in treaties of alliance, the treaty may be equal, and the alliance very unequal, and *vice versa*. The inequality in the stipulations, or engagements of a treaty, does not, in general, render such engagements any the less binding upon the contracting parties.<sup>2</sup>

§ 23. Treaties of *guarantee*, and of *surety*, are engagements by which a State promises to aid another against any interruption of certain specified rights, such as boundaries, territory, constitution or form of government, etc. A distinction is made between guarantee and surety; where the matter relates to things to be done by the party for whom the obligation is contracted, the surety is bound to make good the promise in default of the principal, while the guarantee is only obliged to use his best endeavours to obtain its performance from the principal himself. How far a State may legally

<sup>1</sup> The Society, &c. v. New Haven, 8 *Wheaton Rep.*, p. 464; Sutton v. Sutton, 1 *Russell and Mylne Rep.*, p. 663.

<sup>2</sup> Heineccius, *Elementa de Jur. et Gent.*, lib. ii. §§ 207-211.

contract this class of obligations, must depend first, upon its own constitution, and second, upon the nature of the stipulations with respect to any interference with, or infringement of, the sovereign rights of other independent States.<sup>1</sup>

§ 24. Treaties of *confederation*, and treaties of *association*, not only differ from treaties of general alliance, but are to be distinguished from each other. Treaties of confederation are usually made for the purpose of forming a union, more or less close, in reference to certain specified objects with respect to internal or external matters; as, for instance, the German custom-house confederation<sup>2</sup> and the American colonial confederation. Treaties of association are usually made for the purpose of war, two or more States associating themselves together for the purpose of carrying on joint operations against a common enemy. Treaties of alliance are, on the contrary, usually entered into for the purpose of common security and general defence, but without reference to any particular power, or to any special event. They may, however, in certain cases, as will be shown hereafter, amount to a *warlike association*.<sup>3</sup>

§ 25. Treaties of alliance have been subdivided into different classes, such as treaties of *real* and *personal* alliance; of *equal* and *unequal* alliance; of *general* and *special* alliance; of *defensive* and *offensive* alliance, etc. The first two classes have already been described. General and special alliances may be either defensive or offensive, or both. They, however, differ from each other in their character, and in their effects with respect to the *casus fœderis*, in the event of a war between one of the allies and a third party. General alliances must, also, be distinguished from treaties of limited *succour*

<sup>1</sup> Flassan, *Hist. de la Dip.*, tome viii. p. 195; Phillimore, *On Int. Law*, vol. ii. §§ 56 et seq. The Protestant succession to the throne of England is guaranteed by Austria, France, Holland, and Spain. In the treaty of 1713, 'the treaty of guarantee of the Protestant succession and of the Dutch Barrier,' the British statute 12 and 13 Will. III. cap. ii. is recited.

*Examples of Modern Guarantees.*—By the treaty of 1832 between Bavaria, France, Great Britain, and Russia, the monarchy and independence of Greece was guaranteed. By the treaty of 1839 between Austria, Belgium, France, Great Britain, Holland, Prussia, and Russia, the independence and perpetual neutrality of Belgium was guaranteed.

<sup>2</sup> The Zollverein began in 1818, but the treaty of March 22, 1833, is the basis of its union. Several changes were made in 1867.

<sup>3</sup> Heffter, *Droit International*, §§ 91-93; Puffendorf, *de Jur. Nat. et Gent.*, lib. v. cap. viii. § 3; Grotius, *de Jur. Bel. ac Pac.*, lib. ii. cap. xii. § 24; Klüber, *Précis du Droit des Gens*, § 129.



and *subsidy*. The latter may have no reference to an eventual engagement in general hostilities, and they do not necessarily render the party furnishing them the enemy of the opposite belligerent. Treaties of alliance may expire by their own limitation, or may be dissolved by the consent of the contracting parties, or by a declaration of war between them.<sup>1</sup>

§ 26. Among the ancient nations treaties were sometimes entered into, by which the parties simply stipulated to remain *friends*, and to observe toward each other those pacific relations which international law now impose upon all, without the formality of formal engagements, such as the obligations to render justice, to accord satisfaction for injuries, etc. These were called *treaties of amity or friendship*. But, in modern times, this term is usually applied to *treaties of recognition*, which have for their object the admission of a new body politic into the family of nations, or the recognition of a new title assumed by a State, or its ruler, already recognised as sovereign and independent.

§ 27. Treaties of *commerce* are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse. It will be shown that such treaties usually terminate with a declaration of war between the contracting parties. Treaties of *boundary* and of *cession* are usually of a more permanent character. What particular branch of the Government may make these different kinds of treaties, and how, in general, they are to be ratified, when they become obligatory, and when the legislative authority is requisite to carry them into effect, will depend upon the constitution or political organisation of the Governments of the contracting parties. The proceedings and formalities requisite for this purpose are not only different in different States, but frequently vary, in the same State, with the character of the treaty and the nature of its stipulations.<sup>2</sup>

§ 28. 'As all nations,' says Vattel, 'are interested in maintaining the faith of treaties, and causing it to be everywhere regarded as sacred and inviolable, so likewise they are justi-

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. chs. xii. xiii.; liv. iii. ch. vi.; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. §§ 13, 14; Wildman, *Int. Law*, vol. i. ch. iv.; Bello, *Derecho Internacional*, pt. i. cap. ix. § 2.

<sup>2</sup> Ortolan, *Diplomatie de la Mer*, liv. i. ch. v.; Mably, *Droit Pub. de l'Europe*, tome ii. ch. xii.; Kluber, *Droit des Gens Mod.*, § 152.

fiable in forming a confederacy for the purpose of repressing him who disregards it.' . . . 'Such a sovereign deserves to be treated as an enemy of the human race.'<sup>1</sup> The foregoing remarks of Vattel, with respect to nations combining together for the punishment of a State which violated its treaty stipulations, are not sustained by later authorities. A plain and indisputable violation of a treaty is, undoubtedly, a violation of the law of nations. While a treaty imposes on the one hand a perfect obligation, it produces on the other a perfect right.<sup>2</sup> To violate a treaty is, therefore, to violate a perfect right of him with whom it was contracted. Moreover, such violations are injurious to other States who are not parties to the treaty, for, in the words of Vattel, 'we can no longer depend on the conventions to be made, if those that are made are not maintained.' Nevertheless, they cannot be classed with piracy, or violence to the person of an ambassador. One who openly violates the obligations of a treaty, will incur the disgrace of infamy and the reproach of mankind, but, so far as penal consequences are concerned, it is only the injured party who is justified in resorting to open and solemn war for the purpose of inflicting punishment.

§ 29. The use of an oath, in treaties, does not constitute a new obligation, nor does it strengthen the obligation already contracted. The most that could ever be said of it was, that it gave some additional solemnity to the act, and imposed a *personal* obligation upon the sovereign who took the oath, or gave commission to another to swear for him. It could neither give validity to an invalid treaty, nor a pre-eminence to one treaty above another. The custom, once generally received, of swearing to treaties, has now entirely passed away. 'Even children,' says Vattel, 'know that an oath does

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xv. §§ 221, 222.

<sup>2</sup> Referring, in February 1877, to the obligations of the joint guarantee of Great Britain under the Treaty of Paris, Lord Derby said that if the Powers which had a right to call upon Great Britain to act did not do so, he did not see that it was for Great Britain to enter into the question of what might be their motives or the determining causes which had prevented those Powers from so calling on that country. That is the affair of the former, not of the latter. 'The doctrine,' said he, 'that if you have once bound yourself by treaty to protect any State, you are equally bound to protect it, however unwisely that State may have acted, and though it may have put itself wholly in the wrong, and been the cause of its own difficulty, is one which no one will seriously entertain.' (*Parl. Deb. H. of L.* ccxxxii. 1006.)



not constitute the obligation to keep a promise or a treaty ; it only gives additional strength to that obligation, by calling God to bear witness. A man of sense, or a man of honour, does not think himself less bound by his word alone, by his faith once pledged, than if he had added the sanction of an oath.' The most modern example of the use of the oath was in the alliance between France and Switzerland, 1777. Asseverations are sometimes used in engagements or treaties between sovereigns ; such as, *we promise in the most sacred manner ; with good faith ; solemnly ; irrevocably ; and pledge our royal word, etc.* These are now regarded as mere forms of expression, showing that the parties entered into the engagement with reflection, deliberation, and a full knowledge of what they were doing. The words added nothing to the obligation of the treaty. But the formal and deliberate manner in which treaties are now made and ratified, render such forms of expression entirely superfluous. Even a tacit engagement is as much binding, as one made in express terms. Thus, everything which is necessarily understood in a treaty, and without which its stipulations cannot be carried out, is equally obligatory with the stipulations themselves.<sup>1</sup>

§ 30. Martens says that, in order to make a treaty obligatory, the following five things are necessarily supposed : 1st. That the parties have power to contract. In other words, that the person or authority making the treaty, or ratifying it, had full power for that purpose. 2nd. That they have consented. The form of such consent is entirely unimportant, provided it is fully and clearly declared. 3rd. That they have consented freely. The consent must have been a voluntary act of the contracting party. The plea of *fear*, however, cannot be opposed to the validity of treaties between nation and nation, except, at most, in cases where the injustice of the violence employed is so manifest as not to leave the least doubt. 4th. That the consent is mutual. 5th. That the execution is possible. The last two requisites are too plain to require explanation or comment.<sup>2</sup>

§ 31. The Popes at one time claimed the authority to absolve sovereigns from their engagements and to annul the obligations of treaties, under whatsoever solemnities they

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xv. §§ 225, 229.

<sup>2</sup> Martens, *Précis du Droit des Gens*, § 48.

might be contracted. Vattel mentions a number of instances where, he says, they have undertaken to break the treaties of sovereigns, 'to unloose a contracting power from his engagements, and to absolve him from the oaths by which he had confirmed them.' . . . 'Who does not see that these daring acts of the Popes, which were formerly very frequent, were violations of the law of nations, and directly tended to destroy all the bands that could unite mankind, and to sap the foundations of their tranquillity, and to render the Pope sole arbiter of their affairs.'<sup>1</sup>

§ 32. 'Unhappy experience,' says Vattel, 'having shown that the faith of treaties, sacred and inviolable as it ought to be, does not always afford a sufficient assurance that they shall be punctually observed—mankind have sought for securities against perfidy—for methods, whose efficacy should not depend on the good faith of the contracting parties. A *guarantee* is one of those means. When those who make a treaty of peace, or any other treaty, are not perfectly easy with respect to its observance, they require the guarantee of some powerful sovereign. The party who *guarantees* promises to maintain the conditions of the treaty and to cause it to be observed.' The guarantee may be to all the contracting parties equally, or only to one of them. It is an agreement to cause the fulfilment of the conditions of the treaty, but it in no way affects the conditions themselves; the party guaranteeing, therefore, has no right to interfere between the contracting parties, and decide upon the interpretation which should be given to its stipulations. But if called upon by one of these parties for assistance to enforce the treaty against the other, he must judge for himself whether such assistance is justly due as against the party complained of. We have pointed out, in this chapter, the distinction between guarantee and surety, where the engagements relate to things to be done by the party for whom the obligation is contracted. Sometimes one of the contracting parties puts some of its property or possessions into the hands of another, for the security of its promises, debts, or engagements. Movable things thus remitted are called *pledges*, towns and provinces

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xv. § 223; Salignac, *Hist. of Poland*, vol. iv. p. 112; De Thou, *Hist. de suo Temp.* lib. xvii.; Bougeau, *Hist. de T. de Westphalie*, vol. vi. p. 413; Choisy, *Hist. de Chas. V.*, p. 282; Heffter, *Droit International*, § 94.



are given in *pawn* or *mortgaged*, and if the revenues are ceded as an equivalent for the interest of the debt, it is the fact called *antichresis*. But these securities have no effect upon the obligations of the treaty. The party giving the security is no more excusable for refusing or neglecting to perform his engagements than if no securities whatever had been given.<sup>1</sup>

§ 33. Questions have sometimes arisen with respect to the duration of the guarantee, and the withdrawal or release of the security. The guarantee naturally subsists until the stipulations guaranteed are performed, unless a certain time has been agreed upon for its termination. A general and indefinite treaty of guarantee may be changed or modified the same as any other treaty. As soon as the debt is paid, or the particular engagement is accomplished for which the security was given, the security ends, and the pledge should be returned, or the towns or provinces, held in pawn or under mortgage, should be restored in the same condition in which they were received, so far as depends upon the holder. But this is not always done by those who thus hold the possession ; 'the temptation,' says Vattel, 'is delicious ; they have recourse to a thousand quibbles,—a thousand pretences, to retain an important place, or a country under their obedience. The subject is too odious for us to allege examples ; they are well enough known, and sufficiently numerous, to convince every sensible nation that it is very imprudent to make over such securities. But if the debt be not paid at the appointed time, or if the treaty be not fulfilled, what has been given in security may be retained and appropriated, or the mortgage seized, at least until the debt be discharged, or a just compensation made. The house of Savoy had mortgaged the country of Vaud to the cantons of Berne and Fribourg ; and these two cantons, finding that no payments were made, had recourse to arms, and took possession of the country. The duke of Savoy, instead of immediately satisfying their just demands, opposed force to force, and gave them still further grounds of complaint ; wherefore the cantons, finally successful in the contest, have since retained possession of that fine country, as well

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xvi. §§ 235, 241 ; Gunther, *Europ. Völkerrecht*, b. ii. p. 154 ; Real, *Science du Gouvernement*, tome v. ch. iii. sec. viii. ; Heineccius, *Elem. Juris*, p. 209.

for the payment of the debt as to defray the expenses of the war, and to obtain a just indemnification.<sup>1</sup>

§ 34. Treaties may be dissolved, or their stipulations may terminate in various ways. Some expire by their own limitation, while others are terminated by war between the contracting parties; some are permanent in their nature, and although their operation may be suspended during war, they revive on the return of peace, unless expressly abrogated or altered by a new compact; while others again have reference to both peace and war, or exclusively to a state of war, and consequently continue in force, notwithstanding an entire interruption of pacific relations between the contracting parties. Thus, treaties made for a fixed period of time, or for a specified object, expire on the termination of the time designated, or the accomplishment of the object specified. Treaties of alliance, of succour and subsidy, of commerce and navigation—in fine, all stipulations having reference exclusively to pacific relations, cannot be construed to subsist after such relations have become hostile. Nor is a positive declaration of war necessary to produce this result. In the difficulties of the United States with France, in 1798–9, no public war was declared, but the two States were regarded as in hostile relation to each other, and subsisting treaties were held to be dissolved. Stipulations, which relate to boundaries, to the tenure of property, to public debts, etc., and which are permanent in their nature, are suspended by war, but revive as soon as hostilities cease. The treaties of 1783 and 1794, between the United States and Great Britain, respecting confiscations and alienage, were of a permanent character, and the supreme court held that they were not abrogated by the war of 1812, although their enforcement was, for the time being, suspended. Stipulations relating to prizes, prisoners of war, blockades, contraband, etc., are unaffected by a declaration of war between the contracting parties, and can only be annulled by new treaties, or in the manner provided in the instruments themselves.<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xvi. §§ 243, 244; Klüber, *Droit des Gens Mod.*, § 156; Gardien, *De la Diplomatie*, liv. iv. sec. i. § 1.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 177; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. xv.; Benton, *Thirty Years, &c.*, vol. i. p. 487; Bas v. Tingy, 4 *Dallas R.*, 37; Webster's *Works*, vol. iv. p. 162. In the case of 'the Society for the Propagation of the Gospel' v. New Haven, &c. (5 *Curtis R.* 493), the Court did not feel inclined 'to admit the doctrine



§ 35. But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent State, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things. With respect to alliances, Vattel remarks, that 'when a people are forced to receive laws, they may legally renounce their preceding treaties, if he, with whom they are constrained to enter into an alliance, requires it from them. As they then lose a part of their sovereignty, their ancient treaties fall with the powers that had concluded them. This is a necessity that cannot be imputed to them, and since they had a right to submit themselves absolutely, and to renounce all sovereignty, if it became necessary for their preservation; by a much stronger reason they have a right, under the same necessity, to abandon their allies. But a generous people will try every resource before they will submit to so severe and humiliating a law.'<sup>1</sup>

§ 36. A distinction must be made between obligations and debts already incurred, and those which would be incurred if the treaty had not been terminated before its time by such a change in the circumstances of one of the contracting parties as to render it inapplicable. A change of condition, as

that treaties become extinguished *ipso facto* by war between the two governments unless they should be revived by an express or implied renewal on the return of peace.' Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations dealing in general terms in relation to the subject of private property, the Court was satisfied that there may be treaties of such a nature as to their object and import that war will put an end to them, but where treaties contemplate a permanent arrangement of territorial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. 'If such were the law, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted and would be so monstrous as to supersede all reasoning.' In 1830, the Master of the Rolls, in deciding a question on the 37 Geo. III., cap 97, and the treaty of 1794, whether American subjects who held lands in England were to be considered, in respect of such lands, as aliens or subjects of Great Britain, or whether the war of 1812 had determined the treaty, said: 'The privileges of natives being reciprocally given not only to the actual possessors of land, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace. (Sutton v. Sutton, 1 R. & M. 663.)

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xii. § 176.

the partial loss of its sovereignty and independence,—will not, in general, release such a State from obligations already incurred, although it may prevent any new ones from occurring out of the same instrument, the stipulations of which are no longer applicable or obligatory.<sup>1</sup>

§ 37. 'Treaties of every kind,' says Kent, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.' The same general rule is laid down by Wheaton, but he adds: 'Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way toward explaining the meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt.' These rules are most fully expounded by Grotius, Vattel, Rutherford and Paley. We will give a brief outline of the principles of interpretation, as laid down by these authors.<sup>2</sup>

§ 38. Grotius has devoted an entire chapter to the interpretation of difficult and ambiguous terms. He sets out with

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 10; Phillimore, *On Int. Law*, vol. i. § 137; Suarez, *de Legibus*, &c., p. 109; Bello, *Derecho Internacional*, pt. i. cap. ix. § 3. Alsace, &c., took no part of the great debt of France in 1871.

During the war between Great Britain and the United States, it was enacted by the latter country that all persons who paid debts due to British subjects into the loan office would have a good discharge. When peace was concluded, the treaty provided that 'creditors of either side should meet with no lawful impediments for the recovery of their debts.' It was held by the Supreme Court of the United States that the defendant who had paid his debt to the loan office must, nevertheless, pay it again. That Court considered that in the construction of contracts words are to be taken in their natural and obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense; that the universality of the terms is equal to an express specification on the treaty, and, indeed, includes it. It is fair and conclusive reasoning that if any description of debtors or class of cases were intended to be excepted, it would have been specified. The indefinite and sweeping words made use of by the parties exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination. (*Ware v. Highton*, 3 *Dall. R.* 199.)

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 174; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 17.



the saying of Cicero, that, 'When you promise, we must consider rather what you mean, than what you say.' But as inward motives are not in themselves discernible, we can determine what they were only from the *words* used, and *conjectures* drawn from other parts of the treaty, and from the peculiar circumstances of the particular case. These, he says, must sometimes be considered together, and sometimes separately. Words are not to be strictly construed according to their etymology, but according to their common use, as, 'Use is the judge, the law, and rule of speech.' Technical words, or terms of art, are to be construed according to their meaning in such art. Conjectures are to be drawn from the subject matter, the effect of the terms used, and the circumstances under which the engagement was entered into. He divides things promised into three classes, *favourable*, *odious*, and *mixed*. Favourable promises are those which carry in them an equality and a common advantage; odious promises are those where the charge and burthen is all on one side; and mixed promises are those which partake of both characters, but in which the favourable predominates. In the first, he says, the words must be taken in their full propriety, as they are generally understood, and if ambiguous, they must be allowed their largest sense. In the second, the words are to be taken in a stricter sense, whether they have reference to the subject matter, time, or circumstances. In the third kind of promises, the words are to be taken according to the character of the particular stipulation in which they occur, or of the particular matter or circumstances to which they refer. These distinctions are particularly commented on by Vattel.<sup>1</sup>

§ 39. Vattel lays down several maxims for the interpretation of treaties, which may be briefly stated as follows: 1st. It is not allowable to interpret what has no need of interpretation, for when a treaty is conceived in clear and precise terms, and the sense is manifest, and leads to no absurdity, there can be no reason for refusing the sense which is naturally presented and manifest. To go elsewhere in search of conjectures, is to endeavour to elude it. 2nd. If he who could, and ought to have explained himself clearly, has not done so, he cannot be allowed to introduce subsequent restrictions for his own benefit. *Pactionem obscuram iis nocere, in quorum*

<sup>1</sup> Grotius, *de Jur. Bel. ac Pac.*, lib. ii. cap. xvi.

*fuit potestate legem assertius conscribere.* 3rd. Neither of the contracting powers is allowed to interpret the treaty at his own pleasure. 4th. As the party which made the promise ought to have known his intention, what he has sufficiently declared must be taken for true against him. 5th. The interpretation should be made according to the rules established for determining the sense in which the parties naturally understood it when the treaty was entered into. He next proceeds to lay down the following particular rules on which the interpretation ought to be formed, in order to be just and right. 1st. We must seek to discover the thoughts of the parties who drew up the treaty, and interpret it accordingly. Thus, we must give to a disposition the full extent properly implied in the terms, if such appears to have been the intention of the parties; but its signification should be restrained, if it is probable that the parties at the time so understood it. 2nd. No mental reservations can be admitted. 3rd. Common expressions and terms are to be taken according to common custom. 4th. Technical terms, or terms proper to the arts and sciences, are generally to be interpreted according to the definition given to them by persons versed in such art or science. 5th. We should give to equivocal expressions the sense most suitable to the subject or matter to which they relate. 6th. The same term is not necessarily to be taken in the same sense wherever it appears in the same instrument. 7th. Every interpretation that leads to an absurdity should be rejected. 8th. An interpretation that would render a treaty null and without effect should be rejected. 9th. Vague and obscure expressions should be interpreted in such a manner as to agree with the terms which are clear and without ambiguity. 10th. The whole treaty must be considered together, and an interpretation given to each particular expression so as to agree with the tenor of the whole instrument. 11th. The words of a party should be construed in accordance with the general reasons and motives of the agreement. 12th. The interpretation may be restrictive or extensive, according to reasons and probable intention of the contracting parties. The foregoing is a brief statement of the rules laid down and discussed at great length by Vattel.<sup>1</sup>

<sup>1</sup>(Vattel, *Droit des Gens*, liv. ii. ch. xvii. §§ 263-298.) As to whether stipulations of a treaty can be set up by persons not parties to it, see 'The *Jonge Josias*,' *Edw.* 130.



§ 40. Where treaties or treaty stipulations are in collision or opposition, that is, where two promises are not contradictory in themselves, but are of such a nature as to render it impossible to fulfil both at the same time, Vattel lays down the following rules for determining which shall have the preference. 1st. If what is permitted is incompatible with what is prescribed, the latter is to be preferred. 2nd. What is permitted must yield to what is forbidden. 3rd. What is ordained must yield to what is forbidden. 4th. Other things being equal, that of the most recent date is to be preferred. 5th. A special promise is to be preferred to a general one. 6th. What, from its nature, cannot be delayed is to be preferred to what may be done at another time. 7th. When two promises or duties are incompatible, that of the highest honesty and utility is to have the preference. 8th. If we cannot perform at the same time two promises to the same person, he may select which he prefers. 9th. The stronger obligation has the preference over the weaker; and 10th, What is promised under the higher penalty, has the preference over one with the lesser penalty, or with no penalty at all.<sup>1</sup>

§ 41. Rutherford has discussed this subject with his usual perspicuity and ability, but in a manner somewhat diffuse. We will attempt but a brief outline of his remarks, referring the reader to his chapter on interpretation, the perusal of which will afford both pleasure and profit. A promise, he says, gives us a right to whatever the promiser designed or intended to make ours. But his design or intention, if it be considered merely as an act of his mind, cannot be known to anyone besides himself. When, therefore, we speak of his design or intention as the measure of our claim, we must necessarily be understood to mean the design or intention which he has made known or expressed by some outward mark; because a design or intention, which does not appear, can have no more effect, or can no more produce a claim, than a design or intention which does not exist. Hence, the way to ascertain our claims, as they arise from promises or contracts, is to collect the meaning and intention of the pro-

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xvii. §§ 311-322; Puffendorf, *De Jure Gent.*, lib. v. cap. xii. § 23; the 'Ringerode Jacob,' 1 *Rob.*, 89; Richardson v. Anderson, 1 *Camp. R.*, 65, note.

miser or contractor, from some outward signs or marks. The collecting of a man's intention from such signs or marks is called *interpretation*.<sup>1</sup>

§ 42. The remarks of Dr. Paley, in his work on Moral and Political Philosophy, are well worthy of attention, being as applicable to questions of international law as to questions in ethics. He says: 'Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it.' 'It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise, because, at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must, therefore, be the sense, (for there is no other remaining,) in which the promiser believed that the promisee accepted the promise. This will not differ from the actual intention of the promiser, where the promise is given without collusion or reserve; but we put the rule in the above form to exclude evasion in cases in which the popular meaning of a phrase and the strict grammatical signification of the words differ; or, in general, wherever the promiser attempts to make his escape through some ambiguity in the expressions which he used. Zemures promised the garrison of Sebastia, that if they would surrender, no blood should be shed. The garrison surrendered,—and Zemures buried them all alive. Now Zemures fulfilled the promise in one sense, and in the sense, too, in which he intended at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Zemures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was, in conscience, bound to have performed it.'<sup>2</sup>

§ 43. Many efforts have been made by other writers to lay down precise and positive rules, and to frame formulæ for the various modes of interpretation. In order to facilitate this, a nomenclature of classes, modes and species of construction

<sup>1</sup> Rutherford, *Institutes*, b. ii. ch. vii. § 1.

<sup>2</sup> Paley, *Moral and Pol. Philosophy*, b. iii. pt. i. ch. v.



has been attempted, and numerous cases, actual or possible, have been resorted to for the purpose of elucidating these definitions, and of exhibiting the application of these rules. Thus, Leiber distinguishes between interpretation and construction, dividing the former into close, extensive, extravagant, limited or free, predestinated, and authentic ; and the latter into close, comprehensive, transcendant, and extravagant. The classifications, rules, and arbitrary formulæ which he has given under these heads, are more calculated to astonish and puzzle the reader, as a metaphysical curiosity, than to afford any real assistance in the interpretation or construction of treaties or laws. The same remark is applicable, in a qualified sense, to the numerous rules of the learned Domat. Others, again, as Mackelday and Phillimore, have adopted a more simple classification, and fewer and more general rules.<sup>1</sup>

§ 44. The best modern writers on interpretation have confined themselves to stating the general principles which are to guide us in ascertaining the true meaning of a treaty, law or contract, avoiding all metaphysical distinctions, minute subdivision of terms, and the use of arbitrary formulæ. Of this character are the rules laid down by Story, in his *Commentaries on the Constitution of the United States*. He regards some of the rules of Vattel as erroneous, but speaks in high terms of those given by Rutherforth, a summary of which is found in the preceding paragraphs. Savigny regards the civil law rules of interpretation—which are substantially those of Domat—as affording little aid beyond that which an intelligent and dispassionate consideration of each particular case would furnish. Sedgwick thinks it ‘as vain to attempt to frame positive and fixed rules of interpretation as to endeavour, in the same way, to define the mode by which the mind shall draw conclusions from testimony.’ . . . ‘Nor do I believe it easy to prescribe any system of rules of interpretation for cases of ambiguity in written language, that will really avail to guide the mind in the decision of doubt.’<sup>2</sup>

<sup>1</sup> Leiber, *Legal and Pol. Hermeneutics*, 120, 144, 167–172 ; Domat, *Lois civiles*, liv. prélim. tit. i. § 2 ; Phillimore, *On Int. Law*, vol. iii. pt. v. ch. viii. ; Rayneval, *Inst. du Droit Nat.*, liv. iii. ch. xxiv. ; Pando, *Derecho Int.*, pp. 230 et seq.

<sup>2</sup> Story, *On the Constitution*, vol. i. ch. v. ; Savigny, *Das Obligationenrecht*, b. ii. p. 189 ; Sedgwick, *On Stat. and Con. Laws*, ch. vi.

§ 45. But while we fully agree with Savigny and Sedgwick, that metaphysical classifications, minute subdivisions, and arbitrary formulæ, are not calculated to facilitate the interpretation and construction of laws, it must not be inferred that all rules established for that purpose should be rejected. On the contrary, general rules, which restrain from latitudinarian construction, and from extravagant and false interpretation, have received the approval of the most learned jurists and most distinguished publicists of all ages. Indeed, the very necessity and importance of such rules, for the interpretation of constitutional and statutory laws, have led some authors into the extravagant nomenclature and minute classification which are here objected to. Sedgwick, notwithstanding his objection to rules, very justly remarks that 'there must be some general principles to control' the construction and interpretation of laws, the subject being too important 'to be left to the mere arbitrary discretion of the judiciary.'

And if the necessity of well-established rules for the interpretation of laws be generally admitted, it certainly will hardly be denied that such rules are equally important in connection with international jurisprudence. Some of the bloodiest wars that have been inflicted upon the human race have originated in a conflict of opinions respecting the interpretation of treaty stipulations. Moreover, it not unfrequently happens, that when one nation seeks an excuse for quarrelling with another, or for encroaching on another's rights, some old and long forgotten treaty is brought forth from the dusty archives, or some new interpretation is introduced, with corresponding allegations of a violation of its stipulations. It is not pretended that any rules of interpretation, however complete or well established they may be, will entirely prevent such conflicts and aggressions; nevertheless, they will greatly contribute toward such a result, or, at least, will prevent the real aggressor in an unjust war from escaping the odium which should attach to one who disturbs the peace of nations, under the cloak of a false interpretation of treaty stipulations.<sup>1</sup>

<sup>1</sup> Sedgwick, *On Stat. and Con. Law*, ch. vi.; Bello, *Derecho Internacional*, pt. ii. cap. x.



## CHAPTER IX.

## TREATIES OF PEACE.

1. Peace the end and object of war—2. Power to make war does not necessarily imply that to make peace—3. Laws of different States—4. Power of a prisoner of war to treat—5. Alienation of territory and private property—6. Duty of compensation—7. Allies and associates, in regard to a treaty of peace—8. General character and effects of such treaty—9. Implied amnesty—10. New grievances from same cause—11. Claims unconnected with causes of the war—12. Principle of *uti possidetis*—13. Treaties of peace bind the whole State—14. When obligations commence—15. Upon individuals—16. Individuals liable for civil damages—17. Constructive and actual knowledge of peace—18. Recaptures after treaty of peace—19. In what condition things are to be restored—20. Unpaid military contributions—21. Effect of coercion on validity of treaty—22. Effect of peace on former treaties—23. Breach of a treaty of peace—24. Delays, &c., in carrying treaty into effect—25. War for new cause or for breach of treaty of peace.

§ 1. IT has been laid down as 'an unquestionable proposition of international law that there is a legal as well as a moral necessity that, with the ceasing of the causes which justified the inception of the war, the war itself should cease' Vattel enforces the obligation to seek peace as the end of war, and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and safety, and the moment an equitable compromise can be procured, it should cease. The obligation to accept a peace *sufficiently safe*, is also strenuously argued by Grotius. Other writers say that when, by use of the legal means of war, the invaded right has been obtained or secured, the injury redressed, or the threatened danger averted, the *abnormal* state of war *must* cease, and the *normal* state of peace *must* be re-established. Some, who advocate the general right of external intervention, deem it a most proper occasion to exercise that right, when a war, though lawfully begun, is unlawfully continued beyond the just objects of its inception. There are three ways by which a war may

be concluded and peace restored: 1st. By the unconditional submission of one belligerent to another; 2nd. By a *de facto* cessation of hostilities, and a *de facto* renewal of the relations of peace, by both belligerents; and 3rd. By a formal treaty of peace. We shall here discuss only the latter.<sup>1</sup>

§ 2. The power to declare war does not necessarily include that of making a treaty of peace. These two powers are intimately connected, and the latter would seem naturally to follow the former. They are, therefore, generally associated together, though not always. In unlimited monarchies both reside in the sovereign; and even in limited or constitutional monarchies both may be vested in the crown, yet the conditions of the treaty of peace may be such as to require its ratification by other authorities of the State. For, although the State may have entrusted to the prudence of her ruler the general authority to determine on war and peace, yet this power may be limited in many particulars by the fundamental law or constitution. A nation has the free disposal of its own domestic affairs and form of government, and its sovereign power of making war and peace may be entrusted to a single person, or it may be divided among a number of persons.

§ 3. Thus, Francis I. of France attempted by the treaty of Madrid, to cede to the emperor Charles V. the province of Burgundy; but the states-general, under the constitution of the old French monarchy, declared that the king had no authority to alienate any part of the kingdom by a treaty of peace. The cession of the province of Burgundy was, therefore, annulled, as contrary to the fundamental laws of the kingdom. Under Richelieu and Louis XIV. the old feudal constitution of France was abolished, and all the powers of government concentrated in the hands of the king. Of the different constitutions established in France since the revolution of 1789, some have limited the power of concluding a peace, while others have vested it in the crown without any

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. i. §§ 6, 7, 9; Grotius, *De Jur. Bel. ac Pac.*, lib. iii. ch. xxv. § 3; Phillimore, *On Int. Law*, vol. iii. §§ 509 et seq.; Bello, *Derecho Internacional*, pt. ii. cap. ix. § 6; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xiv.; Albericus Gentilis, *De Legationibus*, lib. iii. cap. i.; Zouch, *De Jure, &c.*, pt. ii. sec. ix.; Wolfius, *Jus Gentium*, cap. viii.; Kampts, *Literatur des Völk.*, §§ 321 331; Kent, *Com. on Am. Law*, vol. i. p. 165; Wildman, *Int. Law*, vol. i. p. 139; Rayneval, *Inst. du Droit Nat.*, &c., liv. iii. ch. xxi.; Heffter, *Droit International*, § 179.



nominal limitation. Nevertheless, so long as the chambers exercise a legislative authority, they necessarily exercise an influence on the treaty-making power, in their right to refuse the passage of laws to carry such treaties into effect. In Great Britain, the treaty-making power, as a branch of the prerogative of the crown, has, in theory, no limits; but in the practical administration of the constitution this power is limited by the general controlling authority of parliament, which body can compel the crown to make peace by withholding the supplies necessary for carrying on the war, and its approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the empire are altered. In confederated governments, as already stated, the treaty-making power, and its extent, must depend upon the nature of the confederation and the formation and character of the government. By the constitution of the United States of America, the president has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the senate, become the supreme law of the land, and have the effect of repealing all other laws of congress, or of the States, which stand in the way of their stipulations. But congress may at any time compel the president to make peace by refusing the means of carrying on the war, and its approbation is necessary for the passage of any laws which might be required for carrying into effect the stipulations of such treaty.<sup>1</sup>

<sup>1</sup> The peace of Westphalia was signed at Munster, October 24, 1648. It is a fundamental law of the Empire, and the basis of all subsequent treaties. In order to satisfy the different Powers, the following important stipulations were found necessary, viz.:—That France should possess the sovereignty of the three bishoprics (Metz, Toul, and Verdun), the city of Pignerol-Breisac and its dependencies, the territory of Suntgau, the landgraviates of Upper and Lower Alsace, and the right to keep a garrison in Philipsburg; that to Sweden should be granted, besides five millions of crowns, the archbishopric of Bremen and the bishopric of Verden secularised, Upper Pomerania, Stettin, the isle of Rugen and the city of Wismar in the duchy of Mecklenburgh, all to be holden as fiefs of the Empire with three votes at the Diet; that the elector of Brandenburg should be reimbursed for the loss of Upper Pomerania by the cession of the bishopric of Magdeburg secularised, and by having the bishoprics of Halberstadt, Minden and Camin declared secular principalities with four votes at the Diet; that the Duke of Mecklenburgh, as an equivalent for Wismar, should have the bishoprics of Schwerin and Ratsburg erected in like manner into secular principalities; that the electoral dignity with the Upper Palatinate should remain with Maximilian, Duke of Bavaria, and his descendants as long as they should produce male issue; but that the Lower Palatinate should be restored to Charles Louis, in whose favour should be established an eighth electorate, to continue till the extinction of

§ 4. A question much discussed in former times, was, whether a prisoner of war can make a treaty of peace? On this subject Vattel remarks: 'Every legitimate government, whatever it may be, is established solely for the good and welfare of the State. This incontestable principle being once laid down, the making of peace is no longer the peculiar province of the king: it belongs to the nation. Now, it is certain that a captive prince cannot administer the government, or attend to the management of public affairs. How shall he, who is not free, command a nation? How can he govern it in such a manner as best to promote the advantage of the people, and the public welfare? He does not, indeed, forfeit his rights; but his captivity deprives him of the power of exercising them, as he is not in a condition to direct the use of them to its proper and legitimate end. He stands in the same predicament as a king in his minority, or labouring under a derangement of his mental faculties. In such circumstances it is necessary that the person or persons whom the laws of State designate for the regency, should assume the reins of government. To them it belongs to treat of peace, to settle the terms on which it shall be made, and to bring it to a conclusion, in conformity to the laws. The captive sovereign may himself negotiate the peace, and promise what personally depends on him; but the treaty does not become obligatory on the nation till ratified by itself, or by those who are invested with the public authority during the prince's captivity, or, finally, by the sovereign himself after his release.'<sup>1</sup>

the House of Bavaria; all the other princes and States were re-established in the lands, rights, and prerogatives which they enjoyed before the troubles of Bohemia in 1618; the Republic of Switzerland was declared to be a sovereign State, exempt from the jurisdiction of the Empire; and the long disputed succession of Cleves and Juliers with the restitution of Lorraine was referred to arbitration. The pacification of Passau was confirmed; it was further agreed that the Calvinists should enjoy the same privileges with the Lutherans; that the imperial chamber should consist of twenty-six Catholic members and twenty-four Protestants; that the Emperor should receive six Protestants into his aulic council; that an equal number of Catholic and Protestant deputies should be chosen for the Diet, except when it should be convoked for the regulation of points that might concern one only of the two religions; that all the deputies should be Protestants if the objects of discussion should belong to their religion, and Catholics in the opposite case. (Russell, *Hist. Mod. Eur.* ii. 195; Dumont, *Corps Diplomat.* tome vi.; Pfeffel, *Abrégé Chronol.*)

<sup>1</sup> Vattel, *Droit des Gens*, lib. iv. ch. ii. § 13. Consent to a treaty, whether written or oral, must be distinct. No supposition or *consensus*



§ 5. Another question of much greater practical difficulty is the limitation of the treaty-making power, expressed or implied, in the fundamental law or constitution of the State. The general authority to make treaties of peace, necessarily implies the power to stipulate the conditions of peace; and among these may properly be involved the cession of the territory and other property of the State, as well as the right of sovereignty or *jus eminens* over private property. 'If then,' says Wheaton, 'there be no limitation expressed in the fundamental laws of a State, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy.' 'There can be no doubt,' says Kent, 'that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other States, it is considered as having invested it with all the power necessary to make a valid contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a State may withhold from the executive department the power of transferring what belongs to the State; but if there be no express provision of that kind, the inference is that

*fictus* is sufficient. A treaty is not binding which is made by a king when a prisoner. Thus Pope Clement VII. refused to ratify a treaty with the Duke Ferrara, which he had made when a prisoner, saying that it was a dishonourable thing for a man in life to ratify a matter done in his name when dead, not consistent with his honour and interest. Again, Francis I. excused himself from ratifying the treaty of Madrid on account of the inhumanity done to him by the permission of Charles V. Some of the ancient treaties of alliance were recited to be made between king and king, subjects and subjects, such as this—'that there be an universal and perpetual, true and sincere peace and amity between the most Christian king of France and the king of Great Britain, their heirs and successors, and between *the kingdoms, States, and subjects* of both.' (See Phil. Comines, lib. ii. cap. 8.)

It has been said (4 Inst. 152) that in England all leagues or safe-conducts should be of record—that is, they ought to be enrolled in Chancery or in the Wardrobe, as being matters of State, that each subject may know who are in amity with the king and who are not, who are enemies and can maintain no action, and who are in league and may have actions personal.

It has been said that if hostages are given to support a treaty, he that gives them is freed from his promise or good faith, for the receiver of the hostages has relinquished the assurance of him who pledged his word.

it has confided to the department charged with the power of making treaties, a discretion commensurate with all the great interests, wants and necessities of the nation. A power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and foreign States could not deal safely with the government on any other presumption. The power that is entrusted generally and largely with authority to make valid treaties of peace, can, of course, bind the nation by alienation of part of its territory; and this is equally the case, whether that the territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private.' The right of making peace, says Vattel, 'authorises the sovereign to dispose of things even belonging to private persons, and the eminent domain gives him this right.'<sup>1</sup>

§ 6. With respect to the duty of the State to make compensation to individuals, and the limits to that duty, the remarks of Wheaton are peculiarly appropriate and just. 'The duty,' he says, 'of making compensation to individuals, whose private property is sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No Government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the State to control, it does not impose any obligation upon the Government to indemnify those who may suffer a loss of property by the cession.' The history of the State of New York furnishes a strong illustration of this rule of public law. The people of the territory now composing the State of Vermont separated from New York and erected that territory into a separate and independent State. Individual citizens whose property would be sacrificed by the event, claimed compensation of New York. The claim was rejected on the ground that the independence of Vermont

<sup>1</sup> Vattel, *Droit des Gens*, liv. i. ch. xx. § 244; ch. xxi. § 262; liv. iv. ch. ii. §§ 11, 12; Kent, *Com. on Am. Law*, vol. i. pp. 166, 167; Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 2.



was an act of force beyond the power of New York to control, and equivalent to a conquest of that territory.<sup>1</sup>

§ 7. 'The principal party,' says Vattel, 'in whose name the war was made, cannot justly make peace, without including his allies.' The same author remarks that States which have been associated in a war, or have directly taken part in it, are respectively to make their treaty of peace each for itself; but that the alliance obliges them to retreat in concert. Such was the practice at Nimeguen, Rieswick, and Utrecht; at Vienna, in 1814, and at Paris, in 1856, the allies and associates in the wars concluded by these conventions, signed together treaties of peace. As associates in a war ally themselves together for the purpose of carrying on the war, it is right and proper that they should act in concert in making a treaty of peace. But as each engages in the war for himself and on his own responsibility, each should be allowed to make his own treaty of peace. To determine in what cases an associate in the war may detach himself from the alliance, and make his own separate and particular peace, is a question of difficult solution. It will be alluded to in a future chapter, and is particularly discussed by Vattel. Associations and alliances in war, as already stated, oblige the parties, as a general rule, to treat in concert. But if any one should insist upon prosecuting the war beyond the object of the association, the others may very properly make peace for themselves. And anyone may make a separate peace for himself, if by so doing he does not violate his obligations, expressed or implied, toward his associates. His right to separate himself from his allies depends entirely upon the nature and object of the alliance, and the obligations he has incurred by joining others in the war against a common enemy.<sup>2</sup>

§ 8. Every treaty of peace, according to Vattel, is nothing more than a compromise. Were strict and rigid justice to be insisted on, it would be impossible ever to make a treaty of peace. Not only the character of the original cause of the war would have to be determined, in order to settle the question as to which of the belligerents was in the wrong, but also all of the operations of the war itself, and the expenses incurred and damages suffered by each party. This would be impossible; no other expedient, therefore, remains but to

<sup>1</sup> Wheaton, *suprà*.

<sup>2</sup> Vattel, *suprà*.

compromise all the claims and grievances on both sides, by a convention as fair and equitable as circumstances will admit of, all parties agreeing upon what terms their several pretensions are to be regarded as withdrawn or extinguished. The general effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. 'It leaves the contracting parties,' says Vattel, 'without any right of committing hostility, either on account of the subject matter which gave rise to the war, or of anything that was done during its continuance; therefore they cannot take up arms again for the same subject. Accordingly, in such treaties, the contracting parties reciprocally engage to preserve *perpetual peace*, which is not to be understood as if they promised never to make war on each other for any cause whatever. The peace in question relates to the war which it terminates; and it is in reality perpetual, inasmuch as it does not allow them to renew the same war by taking up arms again for the same subject which had originally given birth to it.'

§ 9. It is the usual practice to introduce a leading article in a treaty of peace declaring an amnesty or a perfect oblivion of what is past; but although the treaty should be silent on this subject, the amnesty is by the very nature of peace necessarily implied in it. A treaty of peace puts an end to all claims for indemnity for tortious acts committed during the war under the authority of one Government against the citizens or subjects of another, unless they are specially provided for in its stipulations. All personal complaints of losses sustained or injuries committed by subjects of the belligerent powers during the war are, as a general rule, silenced and extinguished by the treaty of peace. There are, however, certain exceptions to this rule, in cases where a valid claim may be subsequently made from peculiar transactions during the war, as in cases of ransom bills, of contracts made by prisoners of war for subsistence, and of trade carried on under a license. So, also, in cases of debts contracted, or injuries committed during the war by such belligerent subjects in a neutral country. In all these cases the remedy may be asserted subsequently to the peace. Although private rights existing before the war may not be remitted by a treaty of

<sup>1</sup> Vattel, *suprà*; the 'Eliza Ann,' 1 Dods. R., 249; the 'Molly,' 1 Dods. R., 396.



peace, the presumption is otherwise as to the rights of kings and nations.<sup>1</sup>

§ 10. But while a treaty of peace extinguishes the original subject of the war, it does not prevent new complaints from the same contested right. The grievances which originally kindled the war are settled, but new grievances arising from the same right or claim, may form a new cause of war, equally just with the former. The remarks of Wheaton and Kent on this point are clear and positive and their language is almost identical with that of Vattel. 'The peace,' says Wheaton, "relates to the war which it terminates; and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated, —for that would furnish a new injury, and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows that all previous complaints and injury arising under such claim are thrown into oblivion by the *amnesty*, necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for future discussion.' 'Peace,' says Kent, 'leaves the contracting parties without any right of committing hostility, for the very cause which kindled the war, or for what has passed in the course of it. It is, therefore, no longer permitted to take up arms for the same cause. But this will not preclude the right to complain and resist, if the same grievances which kindled the war be renewed and repeated, for that would furnish a new injury, and a new cause of war equally just with the former war. If an abstract right be in question between the parties, the right, for instance, to impress at sea one's own subjects, from the merchant vessels of the other, and the parties make peace without taking any notice of the question, it follows, of course, that all past grievances, damages and injury, arising under such claim, are thrown into oblivion by the amnesty which every treaty implies, but the claim itself is not thereby settled either one way or the other.

<sup>1</sup> All complaints and grievances are intended to be buried in oblivion by a treaty of peace. If the same are not brought forward when peace is concluded, the presumption is that it is not intended to bring them forward afterwards. ('The Molly.' 1 *Dods. R.* 306.)

It remains open for future discussion, because the treaty wanted an express concession or renunciation of the claim itself.<sup>1</sup>

§ 11. A treaty of peace does not extinguish claims unconnected with the cause of the war. Debts, existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived. 'The treaty of peace,' continues Wheaton, 'does not extinguish claims founded upon debts contracted, or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence, debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the mean time, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times.'

§ 12. A treaty of peace leaves everything in the state in which it finds it, unless there be some express stipulations to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the possessor, and his title cannot afterwards be called in question. The intervention of peace covers all defects of title, and vests a lawful possession in the purchaser, in the same manner as it quiets the title of the hostile captor himself. This general rule is applied, without exception, to personal property or real, and is called the principle of *uti possidetis*.<sup>2</sup>

§ 13. Treaties of peace are equally valid, whether made with the authorities which declared the war, or with a new ruling power or *de facto* government. Other nations have no right to interfere with the domestic affairs of any particular nation, or to judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession, and the power conferred upon such authorities, by

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 3; Kent, *Com. on Am. Law*, vol. i. pp. 168, 169.

<sup>2</sup> Mably, *Droit de l'Europe*, tome i. ch. ii. p. 144; the 'Foltina,' 1 *Dods. R.*, 452; and see *post*, ch. xvii.



the then existing plan of government, or fundamental law. Treaties of peace, made by the competent authorities of such governments, are obligatory upon the whole nation, and, consequently, upon all succeeding governments, whatever may be their character. 'If the treaty requires the payment of money, to carry it into effect,' says Kent, 'and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. The department of the government that is intrusted by the constitution with the treaty-making power is competent to bind the national faith in its discretion; for the power to make treaties of peace must be co-extensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic regulations and contracts with foreign powers. All treaties made by that power become of absolute efficacy, because they are the supreme law of the land.'<sup>1</sup>

§ 14. A treaty of peace binds the contracting parties from the moment of its conclusion, unless otherwise provided in the treaty itself. Hence, all hostilities are to cease from the time that the belligerent powers are restored to the normal relations of peace, and no rights of war can be subsequently acquired, or (properly speaking) exercised by the parties to the treaty. It also follows, that if the territory be ceded by such treaty, the ceding sovereignty can exercise no authority in the ceded territory, after the conclusion of the treaty, except for municipal purposes, and any grants of land, or of franchises to be enjoyed in the territory so ceded, are utterly null and void. But when is the treaty to be considered as concluded, (in the absence of any stipulation on this point,) at the time of its signature, or of its ratification? Upon this question there is some difference of opinion, although the weight of authority is, that no public treaty begins to operate till it has passed through all the necessary forms and been ratified. It may have a retroactive effect, and relate back to the time of signing, if so provided in the treaty itself, but not otherwise; so, also, the time when it begins to operate may be postponed to a date subsequent to its ratification, but not unless it is so specially provided in the treaty. But the act of ratification may ope-

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. pp. 165, 166.

rate with retrospective effect, to confirm the treaty according to the terms of its provisions.<sup>1</sup>

§ 15. Although a treaty of peace binds the governments of the contracting powers from the moment of its conclusion, (unless otherwise provided,) so that no belligerent right can afterward be lawfully exercised, it does not affect the citizens or subjects of such powers so as to render them *criminally* responsible, and liable to punishment for acts of hostility, till they have actual or constructive knowledge of the peace. The treaty is a law to the subjects of the contracting parties, by which their relations to each other are changed; and no one is punishable for the breach of a law till it is promulgated. A seizure *jure belli* made in time of peace is a wrongful act, and the injured party is entitled to restitution, and the government of the captor is bound to repair the wrong which was committed, through ignorance, by its subject; but the subject is not affected with *guilt* by reason of acts of hostility subsequent to the date of the treaty of which he had not been notified. In order to guard against inconveniences from the want of due knowledge of a treaty of peace, it is usual to fix the periods at which hostilities are to cease at different places, and between different lines of latitude and longitude upon the high seas, and also to provide for the restitution of all property taken at such places after the peace went into operation, but by parties acting in ignorance of it.

§ 16. But while all agree that individuals are not *criminally* responsible for acts of hostility committed after the date of the peace, so long as they are ignorant of it, there seems to be a difference of opinion among publicists whether they are responsible *civiliter* in such cases. Grotius says they are not liable to answer in damages, but it is the duty of the government to restore what has been captured and not destroyed. 'But the latter opinion seems to be,' says Wheaton, 'that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 5; Phillimore, *On Int. Law*, vol. iii. § 517; Pando, *Derecho Pub. Int.*, p. 583; Hylton v. Brown, 1 Wash. R., 312; Baine et al. v. schooner 'Speedwell,' 2 Dallas R., 40; the United States v. Reynes, 9 Howard R., 127; Davis v. the Police Jury, &c., 9 Howard R., 280; the 'Elsebe,' 5 Rob., 189; the 'Eliza Anne,' 1 Dods. R., 244; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. xiii.; Bello, *Derecho Internacional*, pt. ii. cap. ix. § 6.



the captor from civil responsibility in damages ; and that if he acted in good faith, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the State to give its subjects timely notice of the fact, and it is bound in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrong-doer, after a lapse of a great length of time.' The case of the American ship 'Mentor,' which was taken and destroyed off Delaware Bay, by British ships of war, in 1783, after the cessation of hostilities, but before the fact had come to the knowledge of either of the parties, has given rise to much discussion. The opinion of Sir William Scott in that case forms the substance of the foregoing remarks of Mr. Wheaton. This claim against Admiral Digby was decided in 1799. A claim had previously been made against the actual wrong-doer, and rejected by the English prize court. In discussing this case Chancellor Kent remarks : 'It would seem from that case that the American owner was denied redress in the British admiralty, not only against the admiral of the fleet on that station, but against the immediate author of the injury. Sir William Scott denied the relief against the admiral, and ten years before that time, relief had equally been denied by his predecessor, against the person who did the injury. If that decision was erroneous, an appeal ought to have been presented. We have then the decision of the English high court of admiralty, denying any relief in such a case, and an opinion of Sir William Scott, many years afterwards, that the original wrong-doer was liable. The opinions cannot otherwise be reconciled, than upon the ground that prize courts have a large and equitable discretion, in allowing or withholding relief, according to the special circumstances of the individual case ; and that there is no fixed or inflexible and general rule on the subject.'<sup>1</sup>

§ 17. When the treaty of peace contains an express stipu-

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 171 ; Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 5 ; the 'Mentor,' 1 *Rob.*, 179.

lation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, it has been a question among writers on public law whether the captured property should be restored. 'The better and more reasonable opinion is,' says Kent, 'that the capture would be null though made before the day limited, provided the captor was previously informed of the peace; for, as Emerigon observes, since constructive knowledge of the peace, after the time limited in different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect.' Wheaton coincides in this view, but remarks that it may be questionable whether anything short of an official notification from his own Government would be sufficient, in such a case, to affect the captor with the legal consequences of actual knowledge. This point was extensively discussed in the French prize courts, in the case of the capture of the British ship 'Swineherd' by the French privateer 'Bellona' in 1801, but the particular case was decided on the ground that the king's proclamation of peace was unaccompanied by any French attestation, and was not that sufficient and indubitable evidence to the French cruiser of the fact of peace, upon which he ought to have acted.<sup>1</sup>

§ 18. Another question has arisen with respect to the validity of a recapture of a prize, after peace, but without a knowledge of it, and before the prize had been carried *infra præsidia*, and condemned. In the case of a British vessel captured by an American privateer during the war, and recaptured while at sea by a British ship of war, after peace by the treaty of Ghent in 1814, but in ignorance of it, it was decided in a British Vice-Admiralty Court that the possession of the vessel by the American privateer was a lawful possession, and that the British cruiser could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, for the time limited, to all force, and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place.<sup>2</sup>

<sup>1</sup> Kent, *suprà*; Emerigon, *Traité d'Assurance*, ch. xii. § 19.

<sup>2</sup> The 'Legal Tender,' cited *Wheat. Dig.*, 302; the 'Sophie,' 6 Rob., 138.



§ 19. Things stipulated to be restored by the treaty are to be restored in the condition in which the treaty found them, unless there be an express stipulation to the contrary. A fortress or town is, therefore to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair a dismantled fortress, nor to restore the former condition of a territory which has been ravaged by the operations of war. On the other hand, to dismantle a fortification or to lay waste a country after the conclusion of peace, would be an act of perfidy. A conqueror may, however, demolish new works constructed by himself, but not repairs made by him in old works which he himself had injured during the war. The remarks of Vattel on this subject have been approved and adopted by subsequent writers: 'Those things,' he says, 'of which the restitution is, without further explanation, simply stipulated in the treaty of peace, are to be restored in the same state in which they were taken; for the word *restitution* naturally implies that everything should be replaced in its former condition. Thus, the restitution of a thing is to be accompanied with that of all the rights which were annexed to it when taken. But this rule must not be extended to comprehend those changes which may have been the natural consequences and effects of the war itself and of its operations.' The products of things restored or ceded by the treaty of peace are due from the time the restoration or cession of the things themselves takes effect or is due. But all products which were due or collected prior to the date of the restitution or cession, are not to be delivered up, unless otherwise specially stipulated in the treaty, for the fruits belong to the proprietor of the thing, and the possession of things taken in war is accounted a lawful title, subject, however, to the conditions of peace. 'For the same reason,' says Vattel, 'the cession of a fund does not imply that of the produce anteriorly due. This Augustus justly maintained against Sextus Pompeius, who, on having the Peloponnesus given to him, claimed the imposts of the former years.'<sup>1</sup>

§ 20. The same rule is laid down by Vattel, with respect to contributions levied upon the territory or inhabitants ceded or restored by the treaty of peace. 'To raise contributions,'

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. iii. § 30.

he says, 'is an act of hostility, which, on the conclusion of peace, is to cease. Those before promised, and not yet paid, are due, and may be required as a debt. But, in order to obviate all difficulty, it is proper that the contracting parties should clearly and minutely explain their intentions respecting matters of this nature ; and they are generally careful to do so.' But the correctness of the rule, as thus applied to territory restored by the treaty, may very well be doubted. There is a broad distinction between *military* and *civil* rights ; the latter are acquired by contract, conveyance, or other *title*, and are evidenced by the ordinary proofs of *title* ; while the latter are acquired by capture or conquest, and are evidenced by *possession* alone—they begin and end with possession. If the conquest is restored by the treaty of peace, the right of possession is terminated, and with it all the incidental rights of military occupation, such as the right of levying and collecting military contributions. The principle of *uti possidetis* being the basis of every treaty of peace, unless otherwise specially provided in the treaty itself, it follows that the conqueror (the treaty being silent on this point) is entitled to all the contributions which he has collected, by the right of military occupation of the belligerent territory now surrendered ; but not to those which he has levied but failed to collect. His rights over the inhabitants of such territory are *military* rights, and, consequently, terminate with the right of possession, *i.e.* with the treaty of peace which restores the conquest.<sup>1</sup>

§ 21. We have already spoken of the general obligations of a treaty of peace, and have shown that when made by competent authority, it is binding upon the whole State. The question has been raised, how far the plea, that the treaty of peace was obtained through intimidation, or extorted by force, may dispense with its observance. Vattel says that such a plea will not invalidate a treaty, or dispense with its observance : ' First, were this exception admitted, it would destroy, from the very foundations, all the security of treaties of peace ; for there are few treaties of that kind which might not be made to afford such a pretext as a cloak for the faithless violation of them.' But, according to the opinion of the same author, there may be exceptions to this rule, as in the case of a forced

<sup>1</sup> Vattel, *suprà* ; vide *post*, chs. xxxiii. and xxxiv.



submission to conditions equally offensive to justice and to all the duties of humanity. If a rapacious and unjust conqueror subdues a nation and forces her to accept hard, ignominious, and insupportable conditions, necessity obliges her to submit; but this apparent tranquillity is not a peace: it is an oppression which she endures only so long as she wants the means of shaking it off, and against which men of spirit rise on the first favourable opportunity. When Fernando Cortes attacked the empire of Mexico, without any shadow of reason, without even a plausible pretext,—if the unfortunate Montezuma could have recovered his liberty by submitting to the iniquitous and cruel conditions of receiving Spanish garrisons into his towns and his capital, of paying an immense tribute, and obeying the commands of the king of Spain,—will any man pretend to assert that he would not have been justifiable in seizing a convenient opportunity to recover his rights, to emancipate his people, and to expel or exterminate the Spanish horde of greedy, insolent, and cruel usurpers? No! such a monstrous absurdity can never be seriously maintained. Although the law of nature aims at protecting the safety and peace of nations by enjoining the faithful observance of promises, it does not favour oppressors.<sup>1</sup>

§ 22. A treaty of peace may revive former treaties by express stipulation, or, in certain cases, without any stipulation whatever. As a general rule, the obligations of treaties are dissipated by war, and they are regarded as extinguished and gone for ever, unless expressly revived by the treaty of peace. But this rule is by no means universal. 'Where treaties contemplate a permanent arrangement of national rights,' says Kent, 'or which, by their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made.'<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. iv. § 37. It is to be feared that this just censure must be shared by many other nations; and the dealings of the United States with the Red Indian tribes show that her administration is not always animated by the author's benevolent sentiments.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 177; *Sutton v. Sutton*, 1 *Russ. and M.*, 663; the Society for the Propagation of the 'Gospel' v. 'New Haven,' 8 *Wheat. R.*, 494.

§ 23. 'The breach of a treaty of peace,' says Vattel, 'consists in violating the engagements annexed to it, either by doing what it prohibits, or by not doing what it prescribes. Now, the engagements contracted by treaty may be violated in three different ways,—by a conduct that is repugnant to the nature and essence of every treaty of peace in general,—by proceedings which are incompatible with the particular nature of the treaty in question,—or, finally, by the violation of any article expressly contained in it.' These different modes by which a treaty of peace may be violated, are discussed by Vattel at considerable length. We shall allude here only to the last, that is, how far the breach of a single article is a breach of the whole treaty. The violation of any one article of a treaty of peace abrogates the whole treaty, if the injured party so elects to consider it; for all the articles are dependent on each other, and one is to be deemed a condition of the other. It is sometimes, however, expressly stipulated that if one article be broken, the others shall nevertheless be continued in force. But, without such stipulation, the injured party may regard the violation of a single article as overthrowing the whole treaty. 'We have a strong instance in our own history,' says Kent, 'of the annihilation of treaties by the act of the injured party. In 1798, the congress of the United States declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated on the part of the French government, and all just claims for reparation refused.' Publicists very properly distinguish between a void and a voidable treaty. If the treaty be violated by one of the contending parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infractions committed, or he may demand a just satisfaction.<sup>1</sup>

§ 24. Affected delays in performing the conditions of a treaty of peace, are, says Vattel, equivalent to an express denial, and differ from it only by the artifice with which he who practises them seeks to palliate his want of faith; he adds fraud to perfidy, and actually violates the article which he

<sup>1</sup> Vattel, *suprà*; Kent, *Com. on Am. Law*, vol. i. p. 175.



should fulfil. But, if a real impediment stands in the way, time must be allowed, for no one is bound to perform impossibilities. If the obstacle be utterly insurmountable, the other party should accept an indemnification, if the case will admit of it, and the indemnification be practicable. But if no equivalent can be offered, the intervening impossibility undoubtedly cancels the particular obligation.<sup>1</sup>

§ 25. 'There is,' says Kent, 'a very material and important distinction made by the writers on public law, between a new war for some new cause, and a breach of a treaty of peace. In the former case, the rights acquired by the treaty subsist, notwithstanding the new war; but in the latter case, they are annulled by the breach of the treaty of peace, on which they were founded. A new war may interrupt the exercise of the rights acquired by the former treaty, and like other rights, they may be wrested from the party by the force of arms. But then they become newly acquired rights, and partake of the operation and result of the new war. To recommence a war by breach of the articles of a treaty of peace, is deemed much more odious than to provoke a war by some new demand and aggression; for the latter is simply injustice, but, in the former case, the party is guilty both of perfidy and injustice.'<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. iv. §§ 50, 51.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 175; the schooner 'Sophie,' 6 Rob., 143; Moser, *J. F. Vermecht Abhandl.*, No. 1.

## CHAPTER X.

## RIGHTS AND DUTIES OF PUBLIC MINISTERS.

1. Establishment of permanent legations—2. Distinction of diplomatic agents—3. Modern classification—4. Ambassadors, legates and nuncios—5. Envoys and ministers plenipotentiary—6. Ministers and ministers resident—7. *Chargés d'affaires*—8. Secretaries of embassy and legation—9. *Attachés* and the families of ministers—10. Messengers and couriers—11. Domestic and servants—12. General immunities of public ministers—13. Exemption from local jurisdiction—14. In case of plotting against local government—15. In case of owing allegiance—16. In case of voluntary submission to local jurisdiction—17. Extent of such civil jurisdiction—18. Extent of such criminal jurisdiction—19. Public ministers, how punished—20. Their dependents, how punished—21. Testimony of ministers, how taken—22. Exemption of minister's house and personal effects—23. His real estate and private personal property—24. Of taxes and duties—25. Freedom of religious worship—26. Letters of credence—27. Full power to negotiate—28. The minister's instructions—29. Notification of his appointment—30. Presentation and reception—31. His passports and safe-conduct—32. Passage through other States—33. Termination of public missions—34. By death of minister—35. By his recall—36. By expiration of term, or by promotion—37. By change of government—38. Dismissal of a public minister—39. Duty of respect to local authorities.

§ 1. WE have already discussed, under the head of legation and treaty, the general rights and duties of a sovereign State with respect to its diplomatic intercourse with others; we will now consider the rights and duties of the various agents which are usually employed for this purpose. As has already been remarked, the rights of public ambassadors were known and recognised by the classic nations of antiquity, and were, in some degree, though less generally, respected during the middle ages. The increasing interest of different States, in each other's affairs, in modern times, growing out of more extensive commercial and political relations, and the vast improvements in the means of intercourse between the citizens of different countries, has rendered expedient and necessary the institution of resident permanent legations at each other's courts. 'There is no circumstance,' says Wheaton, 'which marks more dis-



tinctly the progress of modern civilisation, than the institution of permanent diplomatic missions between different States.' The establishment of these permanent legations is generally dated from the peace of Westphalia, in 1648.<sup>1</sup>

§ 2. The primitive law of nations made no distinction between the different classes of public ministers ; but the increase in their number and duties, in modern times, has led to numerous distinctions in the name and rank of the different public agents, as well as in the rights which pertain to their respective offices. The distinctions thus introduced into the voluntary law of nations, by the modern usages of Europe and America, have, at times, for the want of exact definition, become the source of serious controversies ; but this usage, as modified and explained by conventions and diplomatic discussions, has at last established a more uniform, though not entirely definite, rule on this subject, which has become incorporated into the international code, as a law by which the rights and duties of each may be sufficiently ascertained.<sup>2</sup>

§ 3. The modern classification, as adopted by the Congress of Vienna in 1815, and that of Aix-la-Chapelle, in 1818, and which, with little variation, has been subsequently followed, is based on the power and authority conferred on the agent by his own government. The first and highest rank is given to those who *represent* the sovereign or State by whom they are delegated ; the second rank to *envoys* not invested with the representative character, but who are sent for particular purposes, and have conferred on them special powers ; third,

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 1 ; Vattel, *Droit des Gens*, liv. iv. ch. v. §§ 55-65 ; Horne, *On Diplomacy*, sec. i. ; Phillimore, *On Int. Law*, vol. ii. §§ 148-151, 211-213 ; Ward, *Hist. Law of Nations*, vol. ii. p. 413 ; Heffter, *Droit International*, § 199 ; Miruss, *Das Europ. Gesandtschaftsrecht*, § 89 ; Kluber, *Europ. Völkerrecht*, § 170 ; Wildman, *Int. Law*, vol. i. ch. iii. ; Bello, *Derecho Internacional*, pt. iii. cap. i. § 1 ; Riquelme, *Derecho Pub. Int.*, lib. ii. cap., Ad. i. Ambassadors are not always to be received, either on account of the person sending, or of the person sent. Thus the Pope refused to receive the ambassador of Henry II., who was sent after the death of Thomas à Becket, on account of the person sending ; and the people of Gaunt refused to receive an ambassador from Louis XI. of France, on account of the person sent, who was a barber.

<sup>2</sup> Kluber, *Acten des Wiener Cong.*, 1814 and 1815 ; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xv. ; Merlin, *Répertoire*, verb. 'Ministre Public', sec. i. ; Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. xviii. § 10 ; Bynkershoek, *De Foro Legat.*, cap. vi. ; Zouch, *De Leg. de Jud.*, p. 139 ; Wicquefort, *L'Ambassadeur et ses Fonctions*, lib. i. §§ 818-838.

to ministers *resident* at a foreign Court, not for any specified object, but performing such duties and exercising such powers as their sovereigns may direct or confer on them; fourth, to agents of a rank subordinate to ministers *charged* by their own governments with the performance of certain diplomatic duties in a foreign country. There are, also, connected with nearly every legation, certain secretaries, attachés, messengers, &c., to whom the usage of nations has given certain privileges and exemptions, while in a foreign State. We shall here consider these public officers in a foreign country, in the following order: first, ambassadors; second, envoys and ministers plenipotentiary; third, ministers resident; fourth, *chargés d'affaires*; fifth, secretaries of legation; sixth, attachés and the families of ministers; seventh, messengers, couriers, domestic servants, &c.

§ 4. Every public minister, in some measure, represents the State or sovereign by whom he is sent, as an agent represents his constituent; but an *ambassador* is considered as peculiarly representing the honour and dignity of his principal, and, if the representative of a monarchical government, he has been regarded as entitled to the dignity and exact ceremonial of one representing the person of his sovereign. The terms *ordinary* and *extraordinary* are applied to designate the time of their intended residence and employment, whether for an indeterminate period, or only for a particular or extraordinary occasion. In Europe, the right of sending ambassadors is considered as exclusively confined to crowned heads, to the great Republics, and to other States entitled to royal honours. Papal legates, or nuncios, at Catholic courts are usually ranked as ambassadors.<sup>1</sup>

§ 5. Envoys and other public ministers not invested with

<sup>1</sup> If a Viceroy send an ambassador, it is high treason; therefore Queen Elizabeth refused to receive a minister of State sent by the Duke of Alva, Governor of Flanders, because he was not provided with credentials from the King of Spain.

The trumpeter sent by the Maid of Orleans to the Earl of Suffolk was not accorded the immunities usually attached to that duty, because the person sending him was not a sovereign, nor one capable of sending a trumpeter. (Grimston, *Hist. of France*, 326.)

The Electors and Princes of Germany, however, had the privilege of sending and receiving ambassadors, concerning the affairs of their own territories, but not concerning those of the Empire. The Hans Towns likewise possessed this privilege, either by prescription or by grant of some of the Emperors.



the peculiar character which is supposed to be derived from representing generally the dignity of the State or the person of the sovereign, come next in rank to ambassadors. They represent their principal only in respect to the particular business committed to their charge at the court to which they are accredited. They are variously named, as envoys, envoys extraordinary, and ministers plenipotentiary, and internuncios of the Pope. Martens says: 'A distinction is made between the envoy and the envoy extraordinary, and between the envoy extraordinary and the plenipotentiary. But these distinctions have no influence with regard to precedence.'<sup>1</sup>

§ 6. In the third class are included ministers, ministers resident, residents, and special ministers charged with a particular business, and accredited to sovereigns. Vattel thus distinguishes between a minister resident, and one called simply minister, and gives us the origin of the name: 'The word *resident* formerly only related to the continuance of the minister's stay, and it is frequent in history for ambassadors in ordinary to be styled only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of a third order, to the character of which general practice has annexed a lesser degree of regard. The resident does not represent the prince's person in his dignity, but only his affairs.' . . . 'Lastly, a custom still more modern has erected a new kind of ministers, without any particular determination of character. These are called simply *ministers*, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignment of rank and character. It was likewise the punctilio of ceremony which gave rise to this novelty. Use had established distinct treatment for an ambassador, an envoy, and a resident. Difficulties betwixt ministers of the several princes often arose on this head, and especially about rank. In order to avoid all contests on certain critical occasions, when they might be apprehended, it has been judged proper to send ministers, without giving them any of these known characters; such are not subjected to any settled ceremony, and can pretend to no particular treatment. The minister represents his master in a vague and indeterminate manner, which cannot be equal to the first degree, and con-

<sup>1</sup> Martens, *Guide Diplomatique*, §§ 8, 14.

sequently makes no difficulty in yielding to an ambassador. He is entitled to the general regard of a person of confidence to whom the sovereign commits the care of his affairs, and he has all the rights essential to the character of a public minister.<sup>1</sup>

§ 7. *Chargés d'affaires*, near the courts of the monarchical Governments of Europe, are not accredited to the sovereigns, but to the ministers of foreign affairs. They are divided into two classes, according to the nature and object of their appointments, viz., *chargés d'affaires ad hoc*, who are originally sent and accredited by their Governments in that capacity, and *chargés d'affaires par interim*, who are substituted in the place of the minister of their respective nations during his absence.<sup>2</sup>

§ 8. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps in respect to their exemption from local jurisdiction.<sup>3</sup> 'The ambassador's secretary,' says Vattel, 'is one of his domestics; but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador, to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master.'<sup>4</sup>

§ 9. The attachés, and the wife and family of a minister, participate in the inviolability attached to his public character. 'The persons in an ambassador's retinue,' says Vattel, 'partake of his inviolability; his independency extends to all his household; these persons are so connected with him that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted, it is an insult to himself. . . . The ambassador's consort is

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. vi. § 73.

<sup>2</sup> Webster, *to Am. Chargé d'Affaires at Vienna*, June 8, 1852; Mail-  
lardière, *Précis du Droit des Gens*, p. 330; Phillimore, *On Int. Law*,  
vol. ii. § 220; Klüber, *Droit des Gens Mod.*, § 182; Martens, *Guide*  
*Diplomatique*, § 15.

<sup>3</sup> Ex parte Cabrera, 1 Wash. C. C. 232.

<sup>4</sup> Vattel, *Droit des Gens*, liv. iv. ch. ix. § 122. *An agent has not the*  
*privilege of legation unless he be accredited.*



intimately united to him, and more particularly belongs to him than any other person of his household. Accordingly, she shares his independency and inviolability; even distinguished honours are paid her, which in some measure could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador communicates itself likewise to his children, who also partake of his immunities.<sup>1</sup>

§ 10. 'The practice of nations,' says Wheaton, 'has also extended the inviolability of public ministers to the messengers and couriers sent with dispatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own Government, attesting their official character; and, in case of dispatches sent by sea, the vessel, or *aviso*, must also be provided with a commission or pass. In time of war, a special agreement, by means of a cartel or flag of truce, with passports, not only from their own Government, but from its enemy, is necessary for the purpose of securing these dispatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister resident in a neutral country, for the purpose of preserving the relations of peace and amity between the neutral State and his own Government, has a right freely to send his dispatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country.' On this subject Vattel very justly remarks: 'Couriers sent or received by an ambassador, his papers, letters, and dispatches, all essentially belong to the embassy, and are consequently to be held sacred; since, if they were not respected, the legitimate objects of the embassy could not be attained, nor would the ambassador be able to discharge his functions with the necessary degree of security.' The states-general of the United Provinces decided, whilst the president Jeannin resided with them as ambassador from France, that, to open the letters of a public minister is a breach of the law of nations. Other

<sup>1</sup> See also § 25. Toucey, *Opinions U. S. Att'ys. Genl.*, vol. v. p. 69; Merlin, *Répertoire*, verb. 'Ministre Public,' sec. vi.; Vattel, *subrd.*

instances may be seen in Wicquefort. That privilege, however, does not, on certain momentous occasions, when the ambassador himself has violated the law of nations by forming or countenancing plots or conspiracies against the State, deprive us of the liberty to seize his papers for the purpose of discovering the whole secret and detecting his accomplices; since, in such an emergency, the ambassador himself may lawfully be arrested and interrogated. An example is furnished us in the conduct of the Roman Government, who seized the letters which a treasonable junto had committed to the hands of Tarquin's ambassador.<sup>1</sup>

§ 11. The domestics and servants of a minister also participate in the inviolability attached to his public character. 'Did not the domestics,' says Vattel, 'and household of a foreign minister solely depend on him, it is known how very easily he might be molested and disturbed in the exercise of his functions.' But as this exemption of persons of this class sometimes leads to difficulties with the local police, the municipal laws of some States, and the usage of most nations, now require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to any of the privileges or exemptions pertaining to them by virtue of their being dependents of a foreign embassy or legation. It was at one time contended that the subjects of the State to which a public minister is accredited, do not participate in his rights of ex-territoriality, but are justiciable by the tribunals of their country. But the better opinion seems to be that, although such State may very properly prohibit its subjects from becoming the employés or servants of a foreign minister, if it do not so prohibit them, they are, while so employed, to be considered without the limits of its jurisdiction.

It must be observed that the minister himself can afford no 'protection;' it is the law which gives a public character to his family, domestics and servants. Hence, a mere appointment by a minister of any person as a member of his household, is, in itself, no protection to such person. It must be shown that he is *bonâ fide* the officer or servant of such household, and that he performs the duties corresponding to the

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 19; Vattel, *suprà*; the 'Caroline,' 6 Rob. 460; the 'Atalanta,' 6 Rob. 441.



position or office which he pretends to hold. A court will inquire if his appointment is a fair *bonâ fide* transaction, and if not, the privilege claimed will not be allowed. The same may be said of the goods of persons claiming such privilege; if they are not *bonâ fide* members of such household, or are engaged in other business or trade, their goods are not exempt from process for debts, rents, etc. Ministers have not unfrequently attempted to protect the persons and property of their friends from arrest or attachment, or execution, by pretended appointments to positions in their household, but the courts have very properly refused to give any countenance to such frauds.<sup>1</sup>

§ 12. The act of sending a minister by the one, and of receiving him by the other, amounts to a tacit compact between the two States, that he shall be subject only to the authority of his own government. The inviolability of the minister is founded upon mutual utility, growing out of the necessity that such officers and agents should be entirely independent of the local authority, in order to properly fulfil the duties of their mission. Hence, the fiction of *ex-territoriality* has been invented, by which the minister, though actually in a foreign country, is considered still to remain within the territory of his own State. He continues subject to the laws of his own country, both with respect to his personal

<sup>1</sup> Vattel, *suprà*; Fontinier *v.* Heyle, 3 *Burr. R.*, 1731; Lockwood *v.* Coysgarne, 3 *Burr. R.*, 1678; Delvalle *v.* Plomer, 3 *Campbell R.*, p. 47; Heathfield *v.* Chilton, 4 *Burr. R.*, 2016; Triquet *v.* Bath, 3 *Burr. R.*, 1478; W. Blackstone, *R.*, 471; Novello *v.* Toogood, 1 *Barn. and Cress. R.*, 554. No right of asylum to refugees in the house of an ambassador appears to be founded on the law of nations.—See Grotius, Wicquefort, Bynkershoek, Merlin, *passim*. See Heathfield *v.* Chilton, 4 *Burr.* 2016 as to the registration in England of the names of the servants of an ambassador. In the present century, in the case of the coachman of Mr. Gallatin, the United States minister in London, the British Government claimed the right to arrest him on a criminal charge for an assault committed outside the residence, and to make the arrest within the limits, admitting, however, the propriety of first giving notice to the minister that he might deliver him up or make arrangements with the police as to the time and manner of their entering to search and seize.—Wheaton, Dana's edit., 303, note. In 1641, Cuthbert Clapton was accused of being a 'Popish priest,' and was condemned to death, although he pleaded that he was interpreter to the Venetian Ambassador. The king, hearing of this, sent for the Ambassador, and presented him with a royal pardon for Clapton. The Recorder and Sheriffs of London were charged to publish the same in the presence of the judges who had condemned him.—*Pub. Rec. Off., Venetian Trans.*, vol. xi., p. 4 et seq. As to inviolability of an ambassador's suite, see *Respublica v. De Longchamps*, 1 *Dall.* 117, *Ex parte Cabrera*, 1 *Wash. C.C.* 232. As to ambassadors among the Jews, see 1 *Chron. c.* xix.

*status*, and his rights of property; and his children, though born in a foreign country, are considered as natives. 'A respect due to sovereigns,' says Vattel, 'should reflect on their representatives, and chiefly on their ambassadors, as representing their master's person in the first degree. Whoever affronts or injures a public minister commits a crime the more deserving a severe punishment, as thereby the sovereign and his country might be brought into great difficulties and trouble. It is just that he should be punished for his fault, and that the State should, at the expense of the delinquent, give a full satisfaction to the sovereign affronted in the person of his minister. If a foreign minister offends a citizen, the latter may oppose him without departing from the respect due to the character, and give him a lesson which shall both efface the stain of the outrage, and expose the author of it. The person offended may further prefer a complaint to his sovereign, who will demand of the minister's master a just satisfaction. The great concerns of the State forbid the citizen, on such occasions, to entertain those thoughts of revenge which the point of honour might suggest, though otherwise allowable. Even, according to the maxims of the world, a gentleman receives no disgrace by an affront for which it is not in his power, of himself, to procure satisfaction. The necessity and right of embassies being established, the inviolability of ambassadors and other public ministers is a certain consequence of it; for if their person be not protected from violence of every kind, the right of embassies becomes precarious, and the success very uncertain. A right to the end, is the right to the necessary means. Embassies, then, being of such great importance in the universal society of nations, and so necessary to their common well-being, the person of ministers charged with this embassy is to be *sacred and inviolable* among all nations.'<sup>1</sup>

§ 13. It is proper to distinguish between the *inviolability* of the public minister and the legal fiction of his *ex-territoriality*. The former is not a consequence of the latter, but the latter

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. ix. § 81; Wicquefort, *de l'Ambas.*, liv. i. § 27; Martens, *Précis du Droit des Gens*, §§ 214-218; Horne, *On Diplomacy*, sec. iii. §§ 20-22; Phillimore, *On Int. Law*, vol. ii. §§ 154 et seq. It was resolved by the English Parliament, that the slaying of the Genoese ambassador in England in the reign of Richard III. was high treason, for ambassadors should be protected like princes. (Stat. Pap. 3 R. 3, num. 18.)



was invented for the purpose of giving security to the former. The mere fact of a public minister being regarded as a foreigner, resident in a foreign country, would not, of itself, necessarily exempt him from local jurisdiction. Article fourteen of the Code Napoléon provides for bringing before the French tribunals *a foreigner resident in a foreign country*, even for engagements contracted *in a foreign country* with a Frenchman. If, therefore, the exemption of the minister depended upon his ex-territoriality, or implied foreign residence, he might still be subject to local jurisdiction. The true basis of all diplomatic privilege consists in the idea of inviolability which international jurisprudence attaches to his person and his office, and from which it cannot be severed. This idea of inviolability is an inherent and essential quality of the public minister, and the office cannot exist without it. International law has conferred it upon the State or sovereign which he represents, and to divest him of that quality, is to divest him of his office, as the two are inseparable. Not so with respect to the fiction of ex-territoriality.<sup>1</sup> So far as that is necessary

<sup>1</sup> Bluntschli, *Droit International*, p. 112, says:—'La fiction de l'ex-territorialité n'est pas la cause de l'immunité dont les personnes ci-dessus jouissent en pays étranger; elle en est simplement l'application à une personne déterminée: la vraie cause c'est le respect de l'indépendance de ceux qui sont chargés de représenter les états. Cette fiction n'a donc que des effets relatifs: sa portée est réglée par les causes réelles de cette immunité . . . . La personne qui jouit de l'exterritorialité n'est pas soumise à la juridiction des tribunaux criminels de l'état où elle réside . . . . Cette disposition, confirmée par l'usage universel des peuples civilisés, est de droit singulier, parce qu'elle arrête le cours régulier de la justice. Elle a quelque chose analogue à l'irresponsabilité des souverains en droit public. Il est, du reste, prudent de rappeler qu'il serait dangereux de mettre à l'essai la valeur de ces fictions des jurisconsultes . . . . Il est, en général, dangereux de pousser trop loin les conséquences du principe de l'exterritorialité; le respect des lois et l'ordre public peuvent en souffrir. Le Droit international se borne à exiger qu'on protège la liberté et l'honneur des états dans la personne de leurs représentants; il ne veut pas qu'on laisse impunis les méfaits de certains individus.'

One of the earliest applications of the word *extra-territorium* to ambassadors is to be found in Grotius. He says (*De Bell.*, lib. 2, cap. 18):—*De non violandis legatis difficilior quæstio, et varie a claris hujus sæculi ingeniis tractata . . . . Rationes quas pro se quisque afferunt nihil definite concludunt; quia jus hoc non ut jus naturale ex certis rationibus certo oritur, sed ex voluntate gentium modum accipit. Potuerunt autem gentes, aut omnino cavere legatis, aut cum certis exceptionibus, nam et hinc utilitas stat pœnæ in gravia delinquentes, et inde utilitas legationum, quarum mittendarum facilitas securitate quanta potest esse maxima optime promoveret. Spectandum ergo quo usque gentes consenserint; quod ex solis exemplis evinci non potest. Exstant enim satis multa in partem utramque. Recurrendum igitur tum ad sapientium judicia, tum ad conjecturas.'*

to the exercise of his functions, or, in other words, to secure his inviolability, it is not an essential quality of the public minister, and therefore may be dispensed with by renouncement or otherwise. It will be seen, hereafter, that this distinction, which is made by the best writers on public law, leads to very important results. As a consequence of the sacredness and inviolability of the person of a public minister, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. This exemption commences the moment he enters the territory of the State to which he is sent, and continues, not only during the whole time of his residence, but until he leaves the country, or at least till he loses his official character, and the protection due to his office. The State to which he is accredited may at any time require him to leave, either before or after his recall by his own Government. Sometimes the period within which he must leave is designated in his letter of dismissal; and, at the termination of that period, the protection due to his office necessarily ceases.<sup>1</sup>

§ 14. But to this general exemption of a public minister from the local jurisdiction of the country of his residence, there are certain exceptions which are well recognised and established in international jurisprudence. These exceptions are: 1. Where he plots against the safety of the Government to which he is accredited; 2. Where he owes allegiance to the country of his residence, and has been received on condition of renouncing any claim to be exempt from the local jurisdiction.

The first of these can hardly be considered a full exception to the general rule of exemption, for it only authorises

He then cites his *judicia*, one from Livy, one from Sallust; then states his conjectures or reasons, the most important of which is 'quod securitas legatorum utilitati quæ ex poenâ est, præponderat.' He then continues:— 'Quare omnino ita censeo placuisse gentibus, ut communis mos, qui quemvis in alieno territorio existentem, ejus loco territorio subjicit, exceptionem pateretur in legatis, ut qui sicut fictione quâdam habentur pro personis mittentium (senatûs faciem secum attulerat auctoritatem reipublicæ, ait de legato quodam M. Tullius), ita etiam fictione simili constituerentur quasi extra-territorium. Unde et civili jure populi apud quem vivunt non tenentur.'

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 14; Phillimore, *On Int. Law*, vol. i. § 219; vol. ii. § 153; Grotius, *de Jur. Bel. ac Pac.*, lib. ii. cap. xviii. §§ 1-6; Rutherforth, *Institutes*, b. ii. ch. ix. § 20; Klüber, *Droit des Gens Mod.*, p. ii. tit. ii. § 203; Bynkershoek, *de Foro Legat.*, c. 17-19; Blackstone, *Commentaries*, vol. i. p. 253; Foelix, *Droit Int. Privé*, §§ 169, 188, 210 et seq.; Heffter, *Droit International*, §§ 204, 205, 212-215; Villefort, *Privilèges Diplomatiques*, pp. 7 et seq.



the enforcement of local jurisdiction, and the exercise of local authority, so far as may be necessary for the defence of the State. 'In case of offences,' says Wheaton, 'committed by public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorise the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his sovereign. But the circumstances which would authorise such a proceeding are hardly capable of precise definition, nor can any general rule be collected, from the examples to be found in the history of nations, where public ministers have thrown off their public character and plotted against the safety of the State to which they are accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defence, and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavouring to resist it.' The weight of authority is, that an ambassador cannot be *punished* by the Government to which he is accredited, for plotting against it, although he may be *forcibly resisted*, and if necessary, *forcibly ejected* from the country.<sup>1</sup>

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 15; Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. xviii. § 4; Bello, *Derecho Internacional*, pt. iii. cap. i. § 3. The authorities to the contrary are Hale, *Pleas of the Crown*, l. 99; Foster, *Crown Law*, 188; Comyn's *Digest*, 'Ambassador'; Huberus, *De Jur. civ.*; and according to R. v. Owen, 1 Rolles, "An ambassador may be condemned and executed for treason if he has conspired the death of the Sovereign to whose territory he is sent. A foreign minister who has committed an assault may be struck in self-defence by the person assaulted.—United States v. Little, 2 Wash. C.C. 205. In the reign of Queen Anne, an ambassador from Peter the Great, Czar of Muscovy, was actually arrested and taken out of his coach in London for a debt of fifty pounds which he had there contracted. Instead of applying to be dis-

§ 15. In the second case, that is, where the minister owes allegiance to the country where he resides, and has been

charged upon his privilege, he gave bail to the action, and the next day complained to the Queen. The persons who were concerned in the arrest were examined before the Privy Council (of which the Lord Chief Justice Holt was at the same time sworn a member), and seventeen were committed to prison, most of whom were prosecuted by information in the Court of Queen's Bench at the suit of the Attorney-General and at their trial before the Lord Chief Justice were convicted of the facts by the jury, reserving the question of law, how far those facts were criminal to be afterwards argued before the judges, which question was never determined. In the meantime the Czar resented this affront very highly and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death. But the Queen, to the amazement of that despotic court, directed her secretary to inform him that she could inflict no punishment upon even the meanest of her subjects, unless warranted by the law of the land, and therefore was persuaded that he would not insist upon impossibilities. To satisfy, however, the clamours of the foreign ministers (who made it a common cause), as well as to appease the wrath of Peter, a bill was brought into Parliament and afterwards passed into a law to prevent and punish such outrageous insolence for the future. And with a copy of this Act, elegantly engrossed and illuminated, accompanied by a letter from the Queen, an ambassador extraordinary was commissioned to appear at Moscow, who declared that though Her Majesty could not inflict such a punishment as was required, because of the defect in that particular of the former established constitutions of her kingdom, yet with the unanimous consent of the Parliament she had caused a new Act to be passed to serve as a law for the future. This humiliating step was accepted as a full satisfaction by the Czar; and the offenders at his request were discharged from all further prosecution. — Blackstone, *Comm.*, b. i. c. vii.; Boyer, *Annals of Queen Anne*.

The Act is as follows. It is quoted as 7 Anne c. 12:— 'Whereas several turbulent and disorderly persons, having in a most outrageous manner insulted the person of His Excellency Andrew Artemonowitz Mattuof, Ambassador Extraordinary of His Czarish Majesty, Emperor of Great Russia, Her Majesty's good friend and ally, by arresting him and taking him by violence out of his coach in the public street and detaining him in custody for several hours, in contempt to the protection granted by Her Majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers authorised and received as such have at all times been thereby possessed of, and ought to be kept sacred and inviolable, be it therefore declared by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in parliament assembled, and by the authority of the same, that all actions and suits, writs and processes commenced, sued or prosecuted against the said ambassador or by any person or persons whatsoever, and all bails or bonds given by the said ambassador or any other person or persons on his behalf, and all recognizances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or colour of such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, and shall be deemed and judged to be utterly null and void to all intents, constructions, and purposes whatsoever.

'2. And be it enacted by the authority aforesaid that all entries, proceedings and records against the said ambassador or his bail shall be vacated and cancelled.

'3. And to prevent the like insolences for the future, be it further de-



received on condition of renouncing any claim to be exempt from the local jurisdiction, a question may arise as to whether such minister is to be considered as really the representative of the country by which he is accredited. And if he is to be regarded as such representative, can the renouncement of his privilege of exemption from local jurisdiction extend to the *inviolability* of his person and office? In other words, must not such renouncement, however general in its terms, be limited to his right of *ex-territoriality*, and with respect to

declared by the authority aforesaid, that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of an ambassador or other public minister of any foreign prince or State authorised and received as such by Her Majesty, her heirs, or successors, or the domestic, or domestic servant of any such ambassador or other public minister, may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

‘4. And be it further enacted by the authority aforesaid, that in case any person or persons shall presume to show forth or prosecute any such writ or process, such person or persons, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process being therefore convicted by the confession of the party, or by the oath of one or more credible witness or witnesses before the Lord Chancellor or Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queens Bench, the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed violaters of the laws of nations and disturbers of the publick repose, and shall suffer such pains, penalties and corporal punishment as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.

‘5. Provided and be it declared that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this Act, and that no persons shall be proceeded against as having arrested the servant of an ambassador or public minister by virtue of this Act, unless the name of such servant be first registered in the office of one of the principal Secretaries of State, and by such secretary transmitted by the Sheriffs of London and Middlesex for the time being, or their undersheriffs or deputies, who shall upon the receipt thereof hang up the same in some publick place in their offices, whereto all persons may resort and take copies thereof without fee or reward.

‘6. And be it further enacted by the authority aforesaid that this Act shall be taken and allowed in all Courts within this kingdom as a public Act, and that all judges and justices shall take notice of it without special pleading, and all sheriffs, bailiffs, and other officers and ministers of justice concerned in the execution of process are hereby required to have regard to this Act, as they will answer the contrary at their peril.’

The Act is only declaratory of the common law of England, of which the law of nations must be deemed a part.—*Novello v. Toogood*, 1 B. & C. 562. In the United States a similar statute was passed April 30, 1790. In France the inviolability of ambassadors was declared by the Constituent Assembly in 1789.

civil jurisdiction only? Would it not be utterly incompatible with his official character, for him to submit to be tried and punished under the local laws as a criminal? But these questions will be more particularly considered in the following paragraphs. The case here supposed is one of theory only, and of little practical importance in modern jurisprudence, as States now never permit their ministers to make any such general renouncement of their diplomatic rights and character.

§ 16. In the third case, that is, where the minister makes a special renouncement of his privilege of exemption and voluntarily submits to the local jurisdiction, several important questions will arise with respect to the manner of making the renouncement, and with respect to the extent of jurisdiction which may be exercised, even where the renouncement is duly made. In the first place, is it sufficient that the minister himself renounces his privileges of exemption, and submits to local jurisdiction, in order to authorise the courts to exercise that jurisdiction; or is it necessary to have the permission of his own government for that purpose? <sup>1</sup> Admitting the necessity of such assent or permission, how is the government to which he is accredited, or its local authorities, to ascertain the fact? Can they go behind the act of the minister to examine his instructions, or to judge between him and his government, as to his authority to act in a matter of this kind? In doing so, would they not assume the character of *Mentor* over the representative of a foreign State? No doubt, the act of the minister must be presumed to have the consent of his government to which alone he is responsible. But this consent being presumed, and the renouncement being within the acknowledged limits of the minister's powers, how is it to be made? Wicquefort is of opinion that a minister who contracts before a notary (*qui avait contracté par-devant notaire*) thereby renounces his privilege of exemption from local jurisdiction, so far as concerns that particular contract. In the case of the American minister at Berlin, who had entered into a contract of lease for the house in which he resided, the landlord, on his removal at the expiration of the lease, retained the minister's goods as security for alleged damages to the premises, under

<sup>1</sup> The permission of his Government is necessary. *United States v. Benner*, 1 *Baldw.* 240.



a general provision of the Prussian civil code, giving him the right to the goods of a tenant, as hypothecated for the payment of the debt. The Prussian government, when appealed to by the American minister, refused to interfere. In the case of M. de Silveira, *conseiller* of the Portuguese legation at Paris, who had been separated from his wife, and had entered into a contract to give her a certain allowance, in which the parties had declared themselves to be domiciled in Paris, and the husband had deposited for this allowance a certain sum in the *Caisse de consignations*;—in a suit by his wife for, among other things, the said alimentary allowance, he pleaded his exemption as diplomatic agent. This title was not contested, and the courts admitted his general exemption from local jurisdiction, but sustained it with respect to the alimentary provision. But neither the opinion of Wicquefort, nor the cases above referred to, are regarded as good authority. The better opinion is, that there must be a special submission to local jurisdiction in the particular case, either directly made, or necessarily implied, by the act of bringing suit as plaintiff, or of consenting to appear as defendant, in a civil action; and certainly, a renouncement of the privilege of exemption must be equally as unequivocal in criminal proceedings. Supposing the renouncement of the diplomatic privilege, and submission to local jurisdiction, to be duly made, we have next to inquire into the *extent* of jurisdiction which is conferred by such acts, and may be lawfully exercised by the local tribunals. We shall consider this question, *first*, with respect to civil suits, and *second*, with respect to criminal matters.<sup>1</sup>

§ 17. *First*, of civil jurisdiction. Voluntary submission to local civil jurisdiction presents two classes of cases: 1st, Where the minister voluntarily appears as defendant in a civil action and admits jurisdiction; and 2nd, Where he appears as plaintiff, and avails himself of the local jurisdiction against another as defendant.

The former class of cases seems, at first sight, to present more difficulties, with respect to *extent* of jurisdiction, than the latter; for, if judgment be given against the minister as defendant, the execution or other process for its satisfaction

<sup>1</sup> Villefort, *Privilèges Diplomatiques*, pp. 10 et seq.; *Gazette des Tribunaux*, Aug. 15, 1857; *Revue Etrangère et Française*, tome ii. p. 31; Martens, *Causes Célèbres*, tome i. p. 229.

issued against his property or person, might seriously infringe upon his diplomatic privilege of *inviolability*. But, in fact, the same result might follow in a case where he is plaintiff; for, if he fail in his suit, judgment might be decreed against him for costs. Moreover, the defendant may present and establish counter-claims to a larger amount than his demand, and thus obtain judgment for the difference. And again, the opposing party may appeal to a higher tribunal, and thus carry the minister, against his consent, to a higher court. Does the minister, by voluntarily submitting to, or claiming the local jurisdiction, become liable to all the consequences the same as an ordinary litigant? It would certainly be very absurd to allow him to claim it in any particular case, and then to withdraw himself from it whenever such a course suited his interest, or convenience. And yet to execute, against him as against an ordinary litigant, the judgment of the court, would seriously compromise the *inviolability* of his diplomatic character. In order to obviate this difficulty, some make a distinction between the judicial proceedings of the court before final judgment, and the supplementary proceedings for the execution of that judgment. 'This last theory,' says Villefort, 'although vague and somewhat arbitrary, is, perhaps, the best in a matter where it may be said more reasonably than in any other, that there is no absolute rule. It, moreover, has the advantage of conforming to the principles laid down by the ancient publicists who founded the science.' According to this view, no proceedings by way of execution of judgment can be taken against the person of the minister, or against any of his property which, by the rules of international jurisprudence, is entitled to the privilege of exemption; in other words, although a minister may renounce his right of *ex-territoriality*, he cannot divest himself of the *inviolability* which the law of nations attaches to his person and office.

The following consequences seem to result from this discussion: 1st, If a minister renounces his privilege of exemption, and submits to local jurisdiction by appearing in a civil action, either as plaintiff or defendant, and judgment be rendered against him, he is bound to pay it; 2nd, If the judgment be in his favour, and the other party appeal to a higher tribunal, he must submit to the jurisdiction of appeal;



3rd, A final judgment against a minister can only be satisfied out of property which he possesses separate and distinct from his diplomatic character, and no proceedings can be taken against his person, or against property privileged by the law of nations.<sup>1</sup>

§ 18. *Second*, of criminal jurisdiction. This, also, involves two classes of cases: 1st, Where the minister is charged with crime and submits to be judged by the local tribunals; and 2nd, Where he appears in the local tribunals, charging another with crime. The two classes of cases seem, at first sight, to be very different, and yet their result may be nearly the same with respect to the *inviolability* of the minister. A distinction, however, must be drawn in the second class, between the case where the minister appears simply as an informer, to give notice of the commission of a crime by another, and where he appears as a civil party in a criminal prosecution. In the former case, his official character is not involved, for he is no party to the judicial proceedings. But if he appears as a civil party, in a criminal prosecution, he may be seriously compromised. According to French law, if the accusation be declared slanderous (*calomnieuse*), he is liable to fine and imprisonment. Such a sentence, if attempted to be carried into execution, necessarily affects the *inviolability* of his official character, in the same manner, though in less degree, than where he himself is the original subject of the criminal proceeding. Wheaton, in speaking of the right of a minister to deliver his domestics up for trial, under the laws of the State where he resides, says, he may do this, 'as he may renounce any of the privileges to which he is entitled by the public law.' Villefort says this statement is not only incorrect, but entirely unsupported by authorities. Perhaps he mistakes the meaning of Wheaton, by giving too literal a construction to his words. If the latter means to say that a public minister may submit himself to a criminal prosecution, which involves corporal punishment, disgrace or infamy, and still retain his official position as the representative of a foreign State, he is evidently in error, for the two characters are utterly incompatible. How could the government, to which he is accredited,

<sup>1</sup> Villefort, *Privilèges Diplomatiques*, pp. 4-18; Riquelme, *Derecho Pub. Int.*, lib. ii. cap. Ad., § 2; Bynkershoek, *De Foro Legat.*, cap. xiv. § 13; cap. xvi. § 2; Merlin, *Répertoire*, verb. 'Ministre Pub.' sec. v.

continue its official intercourse with a man which its tribunals are trying as a criminal under its laws? Again, suppose he be condemned, and the sentence be executed, will it continue to recognise him, when declared infamous, or immured in the walls of a prison? But if Mr. Wheaton means to say that a public minister may renounce his official character, and, having ceased to be the representative of his government, deliver himself up as a private individual, for trial under the laws of the State where he resides, the correctness of the statement will not be disputed.<sup>1</sup>

§ 19. As ministers are exempt from the jurisdiction of the tribunals of the country where they reside, whether civil or criminal, the question has often been discussed, how are they to be punished for their offences, and how are their creditors to obtain justice? The answer is easily deducible from the principles already discussed. The minister is the officer of the State which he represents, and, by the fiction of *ex-territoriality*, he is considered to be within the limits of his own country. His State is responsible for his acts the same as if committed within its own territory.<sup>2</sup> If he commit an offence

<sup>1</sup> Villefort, *Privillèges Diplomatiques*, pp. 18-25; Rayneval, *Inst. du Droit de la Nat., &c.*, tome i. p. 325; Hélie, *Traité de l'Instruction Crim.*, tome ii. ch. iv. § 124.

<sup>2</sup> In 1720, the Envoy Extraordinary of the Duke of Holstein was sued in Holland for debt, contracted by him in course of trade. A decree of arrest and citation was granted against him; all his goods, money and effects within the jurisdiction of the court were subjected to the decree, but his moveables and things belonging to him as ambassador were exempt.—*Bynkershoek, De Foro Legat.*, c. xvi.

Martens relates (t. ii., 110) that in 1772 the Minister Plenipotentiary of the Landgrave of Hesse-Cassel to France was called home. He was much in debt, and his French creditors succeeded in prevailing on the Minister for Foreign Affairs to refuse to grant him his passport until their debts were satisfied. And this was done, but not without the protest of all the other foreign ministers in Paris.

If an ambassador or public minister, during his residence in England, violates the character in which he is accredited to that court, by engaging in commercial transactions that may raise a question between the Government of Great Britain and that of the country by which he is sent, he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character, the proviso in the statute of Anne limiting the privilege in cases of trading, applying only to the servants of the embassy. For this, *Barbuit's case* (*Cas. Temp. Talbot*, 281) is an authority.—*Per Jervis C. J., Taylor, v. Best*, 14 C.B. 487.

There is a manifest distinction between the case of an ambassador and that of a domestic servant of an ambassador. The privilege is not that of the servants but of the ambassador. It is based on the assumption that, by the arrest of any of his household retinue, the personal comfort and state of the ambassador might be affected. Where these are not interfered



upon a citizen of the State where he resides, or refuse to do justice in any of his dealings, the injured party must submit

with, the ambassador is not affected by the suit, and consequently the servant has no privilege. These cases do not in any degree determine the point which has been attempted to be raised on the present occasion—and undoubtedly it is a point which is very fit to be considered whenever it may be properly presented for decision—viz., whether an ambassador or public minister can be brought into court, against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined. Unquestionably it must to a certain extent interfere with the ambassador's comfort to have his rights in any way made the subject of litigation, and therefore it may as well be that the privilege he enjoys is as large and extensive as Mr. Justice Blackburn affirms it to be. But it is unnecessary to determine that question upon the present occasion. Per Maule J., *Ibid.*

In the case of the Magdalena Steam Navigation Company v. Martin, decided in 1859, Lord Campbell delivered judgment:—‘The question raised by this record is whether the public minister of a foreign State accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued against his will in the courts of this country for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister. He says by his plea to the jurisdiction of the court that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius, *De Jure Belli et Pacis*, lib. 2, cap. xviii., sec. 9, ‘Omnis coactio abesse a legato debet.’ He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and if he has done nothing to forfeit or waive his privilege, he is for all judicial purposes supposed to be still in his own country. For these reasons the rule laid down by all jurists of authority, who have written upon the subject, is that an ambassador is exempt from the jurisdiction of the courts of the country in which he resides as an ambassador.

‘Whatever exceptions there may be, they acknowledge and prove this rule . . . Lord Coke’s authority, 4 *Inst.* 153, was cited where, writing of the privileges of an ambassador, having said that for any crime committed *contra jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador as unworthy of so high a place, he adds, and so of contracts that be good *jure gentium* he must answer here. There does not seem to be anything in the contract set out in this declaration contrary to the law of nations, but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist.

‘Mr. Bovill strenuously maintained that at all events the action could be prosecuted to that stage (to judgment), with a view to ascertain the amount of the debt, and enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas in *Taylor v. Best* (14 *C. B.* 487, 493, per Maule J.), it is supported by no authority: the proceedings would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued, and it could hardly be of

his case to his own government, which will demand satisfaction and redress from the State to which the minister belongs. For offences against the laws of the country to which he is accredited, the government of that country may not only dismiss the minister, and send him out of the country, but may demand justice and punishment of his own country, a refusal of which demand will constitute a sufficient cause for complaint, and, perhaps, for actual hostilities. History furnishes numerous cases of this kind. Thus, in 1567, the Bishop of Ross, ambassador of Mary Queen of Scots, was banished from England for conspiring against the sovereign, while the Duke of Norfolk, and other conspirators, were tried and executed. It is true that the crown lawyers deemed him liable to a *penal action*, but the correctness of their opinion was afterwards denied by Albericus Gentilis, Zouch, Sir Robert Cotton Blackstone, and other eminent English authorities.<sup>1</sup> Mendoza, the Spanish ambassador in England, was ordered, in 1584, to depart the realm, for conspiring to introduce foreign troops and dethrone the queen, and a commissioner was sent to Spain to prefer a complaint against him. Again, in the reign

any benefit to the plaintiffs. In the first place there is a great difficulty in seeing how the writ can properly be served; for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his sovereign with one of her ministers.

'It certainly has not hitherto been expressly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant.'—2 *E. & E.*, 111.

When the defendant in a Chancery suit in England was at the time acting as ambassador in Spain, the proceedings were stayed for a year and a day, or unless he should return sooner. And it appeared that this stay of proceeding might be renewed as often as necessary.—*Pilkington v. Stanhope*, *Vernon's Cas.*, ii. 317.

<sup>1</sup> Leslie (the Bishop of Ross) was first of all committed to the custody of the Bishop of London. The following questions were put to the Civil lawyers, viz., Whether an ambassador, procuring an insurrection or rebellion in the prince's country towards whom he is ambassador, is to enjoy the privilege of an ambassador? and, whether he may not *jure gentium et civili Romanorum* be punished as an enemy, traitor, or conspirator against that prince, notwithstanding he be an ambassador? To which they answered:—'Touching those two questions, we are of opinion that an ambassador procuring an insurrection or rebellion in the prince's country towards whom he is ambassador, ought not *jure gentium et civili Romanorum* to enjoy the privileges otherwise due to an ambassador, but that he may notwithstanding be punished for the same.'—Burleigh's *State Papers*, by Murden.



of James I., the Spanish ambassadors, Inoyosa and Colonna, were complained of to the king of Spain for a scandalous libel on the Prince of Wales and Duke of Buckingham, but allowed to depart without trial. In 1654, De Bass, the French minister, was ordered to depart the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell. In 1717, Gyllenburg, the Swedish ambassador in England, was arrested and his papers seized, on a charge of conspiring against the king. This act was justified solely on the ground of necessity for self-defence. In 1718, the Prince of Cellamare, Spanish ambassador in France, was arrested, and his papers seized, under the same charge, and he was conducted, under a military escort, to the frontier. In neither of these cases was any attempt made to try and punish the minister, nor did any of the ambassadors from other courts complain of an infringement of the privileges of their order, though a protest from this body has always been usual when an injury has been done to any member of it resident at the same court. In the case of Gyllenburg, the Spanish ambassador, Monteleone, simply observed that he was sorry some *other way* than the arrest of an ambassador, and the seizure of his papers, could not have been fallen upon for preserving the peace of the kingdom. In the case of Da Sa, brother of the Portuguese ambassador in England, charged, in 1653, with being accessory to a murder, he claimed the privileges of an ambassador; but, on examining his credentials, it was found that he was simply promised a commission at a future time, on the recall of his brother. He was therefore ordered to plead to the indictment. It was generally admitted that if Da Sa had actually been an ambassador, he would not have been liable to trial. At that time the laws of England did not extend, to the suite of a minister, the exemption of the minister himself from the jurisdiction of the courts of the country, in case of murder. It is now, however, generally admitted, that the exemption extends to all the officers and members of his household, and the minister and his government must be held responsible that they be properly punished for any offences they may commit.<sup>1</sup>

<sup>1</sup> Bynkershoek, *De Foro Legatorum*, caps. vi. et seq.; Wicquefort, *L'Ambassadeur*, liv. i. § 29; Martens, *Causes Célèbres*, tome i. pp. 139 et seq.; Wildman, *Int. Law*, vol. i. pp. 103-119; *State Trials*, vol. v.; Lord Somers, *Tracts*, 10-65.

§ 20. But if the dependents of a foreign minister are exempt from local jurisdiction, who is to punish them for crimes, and for offences against the local laws? May the minister himself try, and punish them? Or may his State organise a tribunal, in a foreign country, for that purpose? Or may the minister arrest and send them home for that purpose? Or should he discharge them from his service, and deliver them up for trial, under the laws of the State where he resides? These are important questions, upon which there has been some diversity of opinion and practice. In 1603, a man named Combaut, one of the retinue of the Duc de Sully, the French ambassador at London, killed an Englishman at a brothel. Sully tried the offender by a council of Frenchmen, and condemned him to death, after which he delivered him over to the English authorities, for execution. But James I. pardoned the culprit. The French, however, contended, (and, we think, correctly,) that, although King James might refuse to carry the sentence into execution, or might remit the execution *in England*, yet, as Combaut was a Frenchman, tried and condemned by a French tribunal, the English king had no power to grant him a pardon. The right of the French authorities to try and condemn in England seems not to have been questioned. Hotman mentions two cases of the exercise of this power by ambassadors, but does not approve it. One was that of the Spanish ambassador at Venice, who hung one of his servants from the window of his own hotel. The other was that of a French ambassador in England, during the reign of Elizabeth, who executed one of his servants for committing a rape upon a female of his family. In 1657, one of the servants of M. de Thou, the French ambassador in Holland, attempted violence upon a woman in La Haye. He was arrested by a patrol, and taken to the guard-house. The ambassador demanded his release, which was acceded to immediately, and the minister himself inflicted punishment upon the culprit. The Roman ambassadors punished their own dependents, because they were slaves. The earlier writers on international law conceded the same right to modern ambassadors, over the members of their own family and their servants, at least to the extent of irons, imprisonment, and any corporal punishment, short of taking life. Some even contended for their right to punish with death, where that



penalty would be imposed by the laws of the minister's own State. But more recent publicists are of opinion that the minister cannot himself try or punish criminal offences, and that his own government cannot be permitted to organise a tribunal for that purpose in a foreign State. The minister's house and suite are, for the necessary purposes of his mission, to be regarded as without the territory of the State, but judicial proceedings, and the local punishment of crime, are not the necessary appendages of diplomacy. But may not the minister arrest any member of his suite, and send him home for trial and punishment ; and if so, does this power include the sending away subjects of the State in which the minister resides ? Where citizens of the State enter the service of a foreign minister, they are to be regarded as emigrants from their own, and as domiciled in a foreign country, and consequently as beyond the jurisdiction and protection of their own government. With respect to the general right to arrest and send home, there seems to be no objection, if no force be used. But the minister has no force of his own for this purpose, nor can he require the foreign State to assist him. Moreover, if the criminal is sent to another country for trial, much difficulty would generally result in procuring the attendance of witnesses, and in proving the offence or crime, even where jurisdiction could be taken of the case of crime committed within another State. It, therefore, seems to be the preferable mode, as a general rule, where an employé or minister violates the laws of the State in which he resides, to deliver him for trial and punishment by the laws which he has violated. There are exceptional cases, where the minister would be justified in refusing to make such surrender, and in demanding any such person from the local authorities. As already remarked, a minister is held responsible, to a certain extent, for the conduct of his dependents, and if he neglect to provide for their punishment under the laws of his own country, or to dismiss them from his service, and deliver them up to the local tribunals, he is necessarily regarded as either the instigator or defender of the offences or crimes which they commit. Such a course of conduct, on his part, may constitute a sufficient cause for his dismissal. It was on this ground that the President of the United States, in 1856, revoked the *exequatur* of the British consul at New York. It

was not alleged that the consul had himself been guilty of engaging in the enlistment of British troops within the limits of the United States, but that the offence had been committed by his secretary, with his knowledge, and even in his presence, and that he had neither punished nor dismissed his subordinate, nor had he even disavowed the acts of that subordinate. But, as already stated, the secretary of legation, and other functionaries of embassy, are sometimes, in a measure, independent of the minister, and have the right of *inviolability* due to representatives of their own State. In such cases, the minister can neither dismiss them from the legation, nor can he divest them of their diplomatic immunity, so as to render them justiciable by the local tribunals. The government against which the offence is committed, must, therefore, seek its redress from the State by which such diplomatic agents are appointed, and which is to be held responsible for their good conduct.<sup>1</sup>

§ 21. In case of crime committed in the house of a foreign minister, or by one of his suite, and the accused be given up to be tried by the local authorities, as, also, in cases of crime committed by others, it not unfrequently happens that the only or most important witnesses are the minister, his family, his employés, or members of his legation. But if such persons are entirely exempt from local jurisdiction, how can their evidence be taken?—if they refuse to give it, must the guilty escape unpunished? It is true that they cannot be compelled to appear and give testimony in such cases, unless the right of compulsion be secured by treaty stipulations; nevertheless, modern custom has established the practice, that where the deposition of a minister, or of any person attached to his suite, is required in the courts of the country wherein the minister resides, the secretary, or minister of foreign affairs, requests the minister to appear, or to cause the person summoned to appear, before some competent authority, have their depositions taken, and in due form communicated to

<sup>1</sup> *Cong. Doc.*, 34th Congress, 1st Sess. H. R., *Ex. Doc.*, No. 107; Rutherford, *Institutes*, b. ii. ch. ix. § 20; Klüber, *Droit des Gens Mod.*, §§ 212–214; Huber, *De Jure Civitatis*, liv. iii. sec. iii. cap. ii.; Hotman, *Traité de l'Ambassadeur*, ch. iii. p. 71; Ward, *Hist. Law of Nations*, vol. ii. pp. 486 et seq.; Garden, *De la Diplomatie*, liv. v. § 21; Heffter, *Droit International*, § 216; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xv.; Gardner, *Institutes*, pp. 498 et seq.



the authority which made the request. In most cases, the depositions are taken before the secretary of their own legation. In criminal trials, the laws of some countries require that the testimony be given before the court, and in presence of the accused. In such cases, the foreign office requests the personal attendance of the minister, or person summoned, at the time and place designated. To refuse to comply with such request, without good and substantial reasons, is now regarded as discourteous and disrespectful to the government which makes it, and may justify the dismissal of such minister. In 1856, the government of the United States of America requested the recall of the minister of the Netherlands, for having refused to appear before the court, in the city of Washington, to give his testimony in a criminal cause which was then pending, and in which this minister was a most important witness. There may, however, be cases where the minister would be fully justified in declining to accede to such a request. For instance, if the court should be so wanting in dignity and character as to permit its officers and attorneys to annoy witnesses, by unnecessarily prolonged cross-examinations, and by questions irrelevant and insulting to the witness or to his government, a minister would unquestionably be justified in declining to appear himself, or to direct the appearance of any of his suite, before such a tribunal. A court which allows such license, with respect to ordinary witnesses, forfeits its own dignity and character; but when it is permitted toward officials of foreign States, it is also guilty of disrespect to such States, and violates the law of international comity.<sup>1</sup>

§ 22. The independence of a public minister would be very imperfect, if the house in which he lived, and his personal effects or movables, were not entirely exempt from the local jurisdiction. Otherwise, he might be disturbed under a thousand pretences, his papers searched, his secrets discovered, and his person exposed to insults. Hence, his house is inviolable, and cannot be entered without his permission, by police, custom-house, or excise officers, nor can troops be quartered in it. For the same reasons, his coaches and carriages are usually exempt from all local jurisdiction

<sup>1</sup> Horne, *On Diplomacy*, sec. iii. § 25; Marcy, *Letter to American Minister to the Netherlands*, *Cong. Doc.*; Gardner, *Institutes*, p. 502.

and examination. But the abuse of this privilege, on the part of ministers, by making their houses an asylum for fugitives from justice, and their carriages a means of effecting the escape of guilty persons, has caused it to be very much restrained by the municipal laws of some countries, sanctioned, in some degree, by the tacit consent of other nations. On this subject, Vattel remarks, that 'an ambassador's house, being independent of the ordinary jurisdiction, no magistrate, justices of the peace, or other subordinate officers, are in any case to enter it by their own authority, or to send any of their instruments, unless it be on an occasion of pressing necessity, where the public welfare is in danger, and which admits of no delay. Whatever concerns a point of such weight and delicacy; whatever affects the right and glory of a sovereign power; whatever may embroil the State with that power, is to be laid immediately before the sovereign, and regulated by himself, or on his orders, by his council of State. Thus, a sovereign is to determine how far the right of asylum, which an ambassador attributes to his house, is to be regarded; and if the delinquent be such that his detention or punishment is of great importance to the State, the prince is not to be withheld by the consideration of a privilege which was never given for the detriment and ruin of States.' Thus, when the Duke of Ripparda, in 1726, took shelter in the house of the English ambassador, Lord Harrington, the council of Castile decided that he might be taken out of it, even by force, for, otherwise, what was intended for the benefit of sovereigns would turn to the ruin and destruction of their authority. The Marquis of Fontenay, French ambassador at Rome, sheltered certain Neapolitan exiles and rebels, and attempted to take them out of Rome in his coaches; but the coaches were stopped at the gates and the Neapolitans conveyed to prison. The ambassador sharply complained of this, but the Pope answered him: 'That he had given orders for seizing those whose escape the ambassador had favoured; that since he took the liberty of protecting villains and criminals of all kinds within the ecclesiastical State, he, who was sovereign, should at least be allowed to lay hold of them again, whenever they could be met with, *as the rights and privileges of ambassadors were not to be carried to such a height.*' In 1747, a Swedish mer-



chant, named Springer, accused of high treason, took refuge in the hotel of the English ambassador at Stockholm. The ambassador at first refused to surrender him; but after the Swedish government had surrounded his house with troops, searched everybody who entered it, and caused his carriage, when he left the hotel, to be followed by a guard, he surrendered Springer, under a protest as to the violence done to his ambassadorial privilege. England demanded reparation, but Sweden steadily refused it, and the ambassadors of the two governments were mutually withdrawn. Phillimore, the English author, commenting upon this case, says: 'It seems clear that the conduct of Sweden was in accordance with the principles of international law.'<sup>1</sup>

§ 23. But the real property of a minister, other than his dwelling situate within the territory of the government to which he is accredited, and the personal property of which he may be possessed, as a merchant, or private person, carrying on trade or other business, or in a fiduciary character as an executor, etc., are not exempt from the operation of the local laws and local jurisdiction. The reason of this is, that the minister does not hold such lands and goods by virtue of his office; they are not annexed to his person so as, like himself, to be reputed out of the territory. Every dispute or suit respecting them must be carried on in the tribunals of the country, and they are subject to the ordinary process and proceedings of the courts, even of attachment and seizure. But, as already remarked, the house in which he lives, his carriages, furniture and personal property, connected with his embassy, are excepted from the rule. And in suing a minister, or serving other process of a court, in relation to real estate, other than his dwelling, or to personal property which has no

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. ix. §§ 113-115; Toucey, *Opinions U. S. Att'ys. Genl.*, vol. v. p. 70; Horne, *On Diplomacy*, sec. iii. §§ 30, 31; Phillimore, *On Int. Law*, vol. ii. §§ 180, 204, 205; Martens, *Guide Diplomatique*, §§ 23-27. A criminal at Madrid, in time of Philip II., escaped from justice and took refuge in the house of the Venetian ambassador. The ambassador and suite resisted the officers of justice, but some of the suite were hanged or flogged by the Spanish Government.—De Callieres, *Man. de Negoc.*, ii. 294.

It has been held in the French courts, that an ambassador's house does not enjoy the fiction of its being situated in the country from which the ambassador is accredited, with regard to acts affecting the inhabitants of the country to which he is accredited.—Tribunal of the Seine, First Chamber, July 2, 1872, and June 21, 1873.

relation to the embassy, the minister is summoned and proceeded against in the same manner as an absent person, he being reputed out of the country, and his independence does not permit any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him. This question is very clearly discussed by Vattel, as follows: 'What has no affinity with his (the minister's) functions and character, cannot partake of the privileges derived only from his functions and character. Should, then, a minister, as it has been often seen, engage in trade, all the effects, goods, money, and debts, active and passive, belonging to his commerce, come within the jurisdiction of the country. And though this process cannot be directly addressed to the minister's person, by reason of his independency, he is, by the seizing of the effects belonging to his commerce, indirectly brought to a necessity of answering by such seizure. The abuses arising from a contrary practice are manifest'<sup>1</sup>

§ 24. The minister's person, and personal effects, are not liable to assessment and taxation. But his real property, and his movables (not connected with his mission or embassy) are all subject to taxation, according to the municipal laws of the country. By the usage of most nations, he is exempt from the payment of duties on the importation of articles for his own personal use, and that of his family. But this latter exemption is sometimes limited to a fixed sum per annum, or during the continuance of the mission. The government to which the minister is accredited, and of the country through which he may pass, has a right to adopt and enforce all necessary rules for the protection of its revenue from impositions and fraud, under the guise of importations or exportations, by foreign ministers or their dependents. Hence, goods purporting to be the personal effects of a minister, or for the private

<sup>1</sup> Vattel, *suprà*; Klüber, *Europ. Völkerrecht*, § 210; Garden, *De la Diplomatie*, liv. v. §§ 18 et seq.; Martens, *Précis du Droit des Gens*, § 217; Foelix, *Droit Int. Privé*, § 216; Heffter, *Droit International*, §§ 215, 217; Bello, *Derecho Internacional*, pt. iii. cap. i. § 3; Riquelme, *Derecho Pub. Int.*, lib. ii. cap. Ad., 2.

In England, the Court of Chancery will restrain a third party from delivering monies, in dispute, to an ambassador, although the title of the latter to the same may be good in law.—Gladstone *v.* Musurus Bey, 9 *Jur. N.S.* 71.

This preventive jurisdiction is in accordance with the interdict of the civil law, and such appears to have been applicable to legates under the same.—*Dig. v. t. i.* 28.



use of himself and family, cannot claim a free passage through the custom-houses, even where, by usage, they are exempted from duty. Sometimes regular duties are exacted at ports of entry, and the sums so paid are reimbursed to the minister direct from the national treasury, and, in other cases, the goods are placed under the custom-house seals, and transported to his residence under the direction of custom-house officers. The language of Vattel, on this point, is very clear and just. 'Among those rights,' says he, 'that are not necessary to the success of embassies, there are some likewise not founded on a general consent of nations, but which are, nevertheless, by the custom of several countries, annexed to the character. Such is the exemption from the duties of importation and exportation for things which come into a country for a foreign minister, or which he sends out. There is no necessity for him to be distinguished in this respect, since, by paying these duties, he would not be the less able to discharge his functions. If the sovereign is pleased to exempt him from them, it is a civility which the minister could not claim by any right, no more than that his baggage, or any chests, etc., which he sends for from abroad, shall not be searched at the custom-house. Thomas Chaloner, the English ambassador in Spain, sent home a bitter complaint to Queen Elizabeth, his mistress, that the custom-house officers had opened his trunks in order to search them. But the Queen returned him for answer, *that an ambassador was to put up with everything that did not directly offend the dignity of his sovereign*.' So, while the ambassador is exempt from the capitation tax, and every personal imposition relating to the character or quality of a subject of the State, he is expected to pay tolls, postage, etc., and the ordinary duties imposed on the goods and provisions he may use.<sup>1</sup>

§ 25. A minister, resident in a foreign country, is entitled to the privilege of religious worship according to the peculiar forms of his own faith, although it may not be generally tolerated by the laws of the State to which he is accredited. But this right is, in strictness, confined to his own residence ;

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. vii. § 105 ; ch. ix. § 117. In England, an ambassador is liable to pay legacy duty.—Atty.-General v. Kent, 31 L. J. N.S. 391.

he can do what he pleases within his own walls, and nobody has a right to object or interfere. 'But if the sovereign of the country where he resides has good reasons for not permitting him to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less accused of offending against the law of nations.' This limitation, which Vattel has placed on the right of religious worship, is approved by other text-writers, although, at this day, no civilised country refuses ambassadors this free exercise, except so far as it might interfere with municipal police regulations for maintaining public order. 'The increasing spirit of religious freedom and liberality,' says Wheaton, 'has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rights celebrated beyond the walls of the chapel.' Privileges of this nature are usually matters of treaty stipulations.<sup>1</sup>

§ 26. Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honours attached to his rank, must be furnished with a *letter of credence*. Such letter usually states the general object of the mission or appointment, the official character of the agent, and requests that full faith and credit may be given to his acts and deeds, as such agent of his government. The execution of this letter depends upon the municipal laws of the State issuing it, and upon the official rank of the agent. In the case of ministers of the first three classes, the letter is usually signed by the sovereign or chief magistrate of the State which sends them, and is addressed to the sovereign or chief magistrate of the State to which they are delegated. In the case of subordinate agents, it is usually addressed by the minister

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 21; Vattel, *suprà*. In 1678 it was ordered by Parliament (December 4) that His Majesty be humbly desired to call again on the Foreign Ministers, in England, for an account of the numbers and names and places of abode of the priests that attended them, and also to give orders for some 'effectual means of preventing the scandalous resort of numbers of his subjects to the chapels of Foreign Ministers.'



or secretary of foreign affairs to the department of foreign affairs of the other government.<sup>1</sup>

§ 27. The *full power* authorising the minister to negotiate is sometimes inserted in the letter of credence, but it is more usually drawn up in the form of letters patent. In general, ministers sent to a congress or convention of nations, are not furnished with a letter of credence, but with letters patent, or a full power, of which they reciprocally exchange copies with each other on the assembling of the congress. But a *full power* to negotiate does not necessarily bind the State to the treaty which may be signed by the minister under such power. It not unfrequently happens that the power of ratifying or rejecting a treaty, is vested in other authorities than that which conferred the power to negotiate. Thus, in the United States the power to negotiate is conferred by the President, but no treaty is binding till confirmed by two-thirds of the senate.

§ 28. The instructions of a minister, from his own government, are for his own direction only, and are not to be communicated to the government or congress to which he is delegated. He cannot be compelled to show them. He, however, may be directed by his own government to communicate them either partially or *in extenso*, or it may be left to his own discretion to communicate them or not, as he may deem expedient. But, without such permission, specially given, diplomatic instructions are always regarded as confidential communications, with the contents of which the government to which he is credited has no right to be made acquainted. Instances have occurred where ignorant and unskilful ministers have communicated such instructions without authority, to the embarrassment and injury of their own government.

§ 29. It is the duty of every diplomatic agent, on his arrival at his destined post, to notify the government to which he is accredited. In case of a minister of one of the higher classes, he is furnished with a duly authenticated copy of his letter

<sup>1</sup> During the war of 1870, the British Government agreed with France to undertake the protection of the French in Prussia, after ascertaining, as a matter of form and courtesy, that such a course would be agreeable to the Prussian Government. The archives of the French Embassy were sealed up and delivered to the English ambassador.—*Journal Officiel*, July 24.

of credence, which is delivered to the minister of foreign affairs, requesting an audience of the sovereign or chief magistrate of the State, for the purpose of delivering the original letter of credence. *Chargés d'affaires*, and other subordinate agents, notify their arrival to the minister of foreign affairs by letter, at the same time requesting an audience of the minister for the purpose of delivering their letters to him.

§ 30. The ceremony of *solemn entry*, which was formerly practised with respect to ambassadors and other ministers of the first class, is now usually dispensed with, and they are received in a *private* audience in the same manner as other ministers. On their presentation, by the minister of foreign affairs, they usually deliver their original letter of credence (which is returned to them), and pronounce a short complimentary discourse, which is replied to by the sovereign or chief of the State, to whom they are presented. Such presentation and reception is a sufficient acknowledgment of their official character to enable them to enter on their functions. Each court has its particular ceremonial for the presentation and reception of foreign ministers, which such ministers conform to as a matter of etiquette.

§ 31. Although the minister's character is not declared in its whole extent, so as to secure to him the enjoyment of all his rights, till he has had his audience and been acknowledged and admitted by the chief authority of the State to which he is accredited, he is, nevertheless, under the protection of the law of nations from the date of receiving his letter of credence, or official document of appointment. In passing through the country to which he is sent, in order to reach his destined post, he only requires, in time of peace, a passport from his own government, certifying to his official character. But in time of war he must be provided with a safe-conduct, or passport, from the government of the State with which his own country is in hostility, to enable him to travel securely through its territories. A refusal to give such safe-conduct is a virtual refusal to receive or admit such ministers. 'If they undertake,' says Vattel, 'to pass privately, and without permission, into places belonging to their master's enemy, they are liable to be arrested; and of this, the last war furnished a signal instance. An ambassador of France, going to Berlin, by the imprudence of his guides, took his way through a village



within the electorate of Hanover, of which the sovereign, the king of England, was at war with France. He was arrested, and afterward sent over to England. As his Britannic Majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia complained of it.<sup>1</sup>

§ 32. In passing through the territory of a friendly State, other than that of the government to which he is accredited, a public minister, or other diplomatic agent, is entitled to the respect and protection due to his official character, though not invested with all the privileges and immunities which he enjoys in the country to whose government he is sent. He has a right of innocent passage through the dominions of all States friendly to his own country, and to the honours and protection which nations reciprocally owe to each other's diplomatic agents, according to the dignity of their rank and official character. If the State through which he purposes to pass has just reason to suspect his object to be unfriendly, or to apprehend that he will abuse this right by inciting its people to insurrection, furnishing intelligence to its enemies, or plotting against the safety of the government, it may very properly, and without just offence, refuse such innocent passage. But if an innocent passage is granted (and it is always presumed to be by a friendly power, unless specially denied), he is entitled to respect and protection, and any insult or injury to him is regarded as an insult or injury, both to the State which sends him, and that to which he is sent. The following remarks of Vattel on the assassination of the French ministers, on the Po, are both appropriate and just. 'Francis I., king of France, had all the reason in the world to complain of the murder of his ambassadors, Rincon and Fregose, as a horrible crime against public faith and the law of nations. These two persons, destined, the one to Constantinople and the other to Venice, having embarked on the Po, were stopped and murdered, in appearance by order of the governor of Milan. The negligence of the Emperor Charles V. to discover the author of the murder, gave room to think that he had ordered it, or, at least, that he had tacitly approved of the act. And as he did not give suitable satisfaction concerning it, Francis I. had a very just cause for declaring war against him, and even for demanding the assistance of all other

<sup>1</sup> Flassan, *Hist. Dip. Fran.*, tome v. p. 246.

nations. For an affair of this nature is not a particular difference, or a litigious question, in which each party wrests the law over to his side; it is a quarrel of all nations who are concerned to maintain, as sacred, the right and means of communicating together, and treating of their affairs.' In time of general war or public danger, and when peculiar caution is necessary to be observed in the admission of strangers within a country, although an innocent passage is not often refused to a foreign minister, or other diplomatic agent, yet it is not unusual or improper in such cases to restrict it within very narrow limits by prescribing the particular route he must travel. Thus, at the famous congress of Westphalia, whilst peace was negotiating amidst the dangers of war and the noise of arms, the routes of the several couriers sent or received by the plenipotentiaries were marked, and out of such limits their passports were of no protection. The Spaniards found similar maxims to prevail even in Mexico and the neighbouring countries. The ambassadors were respected all along the road, but if they went out of the highway they were to forfeit their rights. Such reservations are sometimes necessary to guard against spies being sent into a country, under the guise of diplomatic agents.<sup>1</sup>

§ 33. The public mission of a minister may be terminated in various ways, as, for example, by his death, by the expiration of the period of his appointment, by the termination of the special negotiation or object of the mission, by his recall, by the death of his sovereign, or a radical change in the sovereignty or government of his State, by a change in his diplomatic rank, by his own withdrawal, and termination of his mission, or by his dismissal by the government to which

<sup>1</sup> Vattel, *Droit des Gens*, liv. iv. ch. vii. §§ 84, 85; Martens, *Causes Célèbres*, tome i. p. 310; Phillimore, *On Int. Law*, vol. ii. §§ 172-175; Gardien, *De la Diplomatie*, liv. v. § 26; Heffter, *Droit International*, §§ 204, 212; Rayneval, *Institutions, etc.*, Appen. No. 2; Wicquefort, *De l'Ambassadeur*, liv. i. § 29; Grotius, *De Jur. Bel. ac Pac.*, lib. iv. cap. xviii. § 5; Miruss, *Das Europ. Gesandtschaftsrecht*, § 365. Other instances of the detention of a sovereign or ambassador are found in the arrest of Richard I. of England (he having no safe-conduct) by the Duke of Austria in 1192; the arrest of the English ambassador to Venice while passing through Austria, the case of Earl of Holderness, 1744 (De Martens, *C.C.ii.*, App. 479); the arrest of the ambassador from the Court of Brittany to England while passing through France in 1464; the arrest of the Plenipotentiaries from France to Switzerland and Naples while passing through Austria in 1793. (See *post*, vol. ii., p. 324).



he is accredited. Custom has established particular forms of proceedings applicable to each case, which forms are followed as a matter of etiquette, rather than of strict right or obligation. When, by any of the circumstances above-mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled by courtesy to all the privileges of his public character until his return to his native country. The time, however, may be limited for such return, at the termination of which his privileges will cease.<sup>1</sup>

§ 34. Where the mission is terminated by the death of the minister, the secretary of legation, or, if there be no secretary, the minister of some allied or friendly power, places seals upon his effects, takes charge of his body, and makes the arrangements for its interment, or for sending it home. The local authorities do not interfere unless in case of necessity. All the honours and respect due to the minister while living, are usually paid to his remains; and, although in strictness, the personal privileges of his dependents expire with the termination of his mission by death, the usage of nations extends to the widow, family, and domestics of a deceased minister, for a limited period, the same immunities which they enjoyed during his lifetime. The validity of his testament, and disposition of his movable property, *ab intestato*, must be determined by the laws of his own country, on the principle of the ex-territoriality of his residence.<sup>2</sup>

§ 35. Where the mission is terminated by an ordinary formal letter of recall, nearly the same formalities are observed as on the arrival of the minister at the court to which he is accredited. He delivers a copy of his letter of recall to the minister or secretary of foreign affairs, and asks an audience of the sovereign or chief executive for the purpose of taking leave. At this audience he delivers or exhibits the original of his recall, and takes his leave with a complimentary address suited to the occasion, and to which a complimentary reply is

<sup>1</sup> In January, 1793, the French ambassador, M. Chauvelin, was ordered to quit England, as being the representative of a regicide government.—James, *Nav. Hist.*, vol. i. p. 46.

<sup>2</sup> Wheaton, *Elem. Int. Law*, p. iii. ch. i. § 23; Martens, *Guide Diplomatique*, §§ 60-65; Horne, *On Diplomacy*, sec. vii. §§ 54-57; Heffter, *Droit International*, § 225; Moser, *Versuch, etc.*, B. 6, pp. 192, 569; Miruss, *Das Europ. Gesandt., etc.*, §§ 180-182; Riquelme, *Derecho Pub. Int.*, lib. ii. caps. Ad., i. ii.; Real, *Science du Gouvernement*, tome v. p. 337.

usually made. But if he is recalled at the request of the government to which he is accredited, for misconduct or other objections, he would neither ask nor receive an audience of leave. If recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave.

§ 36. When the mission is terminated by the expiration of the minister's appointment, as in the case of embassies of mere ceremony, or of special negotiations which have been accomplished or have failed, a formal letter of recall is not usually sent to the minister by his own government. But the formalities of taking leave are nearly the same as in case of an ordinary recall by letter. Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

§ 37. Where the mission terminates by the decease or abdication of the minister's own sovereign, or the sovereign to whom he is accredited, it is usual for him to await a renewal of his letters of credence. In the former case, a mere notification of the continuance of his appointment is sent by the successor of the deceased or deposed sovereign, and in the latter, new letters of credence are sent to the minister to be presented to the new ruler. If a radical change should take place in the character or organisation of his own government, it would be the duty of the minister to await new letters of credence, or a ratification of his appointment by the new government. The government to which he is accredited would be justified in declining any new negotiations with him without such ratification, or new appointment, or, at least, without some evidence of a renewal or continuance of his powers.

§ 38. When, on account of the measures of his government, the court at which he resides thinks fit to discontinue all diplomatic intercourse with a minister, this is usually done by a diplomatic note informing him of that fact, and offering



him his passport. But when the court at which he resides thinks fit to send him away on account of his own misconduct, it is usual to notify his government that he is no longer an acceptable representative, and to request his recall. If the offence be of an aggravated character, he may be dismissed without waiting for a recall by his own government. The government asking such a recall may, or may not, at its own option, state the reasons for the request; they cannot be required. It is sufficient that he is no longer acceptable. In such a case international courtesy would require his immediate recall. If, however, the request should not be complied with, his dismissal would follow as a matter of course. This is done by a simple notification and the offer of his passport. The dismissal of a public minister for personal or official misconduct, is not an act of disrespect or hostility to the government which sent him, and cannot be made a cause of war. No State has a right to send to, or continue at, another court, a minister who is personally unacceptable to that court; an attempt to do so is, in itself, a mark of disrespect and unfriendliness. If the government to which a minister is accredited, refuses to receive him, his position is similar to that of one who is recalled or dismissed; that is, he has no ministerial powers, but retains his privileges and the exemptions of his ex-territoriality so long as he remains in the country. But the time of his remaining may be limited to a particular period, after the expiration of which his diplomatic privileges cease; or if he engage in, or contemplate any act not consonant with the laws, the peace, or the public honour of the country to which he was accredited, the courtesy of transit may be withdrawn. The diplomatic character will not be allowed to be made a cloak for the infringement of international or municipal laws.<sup>1</sup>

§ 39. All ministers and diplomatic agents, of whatever description, are bound to respect the government and authorities of the country where they reside. Any disrespect, on the part of such officers or agents, are good and sufficient causes for asking their recall; or, in aggravated cases, for dismissing them and sending them out of the country. Such

<sup>1</sup> *Cong. Doc.* 34 Cong., 1st Sess. H. of R., *Ex Doc.*, No. 107; Cushing, *Opinions of U. S. Att'ys Genl.*, vol. viii. pp. 471, 473; Merlin, *Répertoire*, verb. 'Ministre public,' § 5.

offences are seldom, if ever, committed by diplomatists of character and experience ; but, where a State appoints, as its representatives at foreign courts, men who do not possess the requisite qualifications for the office, it is liable not only to occasional mortifications at the conduct of such agents, but to the risk of being unnecessarily involved in serious international difficulties. Indeed, nations are not unfrequently involved in long and bloody wars through the faults and unskilfulness of their public ministers and diplomatic agents.<sup>1</sup>

<sup>1</sup> Bello, *Derecho Internacional*, pt. iii. cap. ii. § 1 ; Heffter, *Droit International*, §§ 206, 207, 232 ; Wicquefort, *De l'Ambassadeur, etc.*, liv. i. § 20.

General Bonaparte, at a reception at the Tuileries, went straight up to the British ambassador and put several hurried questions to him concerning the policy of the British Cabinet in a tone of anger. The ambassador made a respectful bow, but gave no reply.—*Mem. of Rev.*, vol. i.

Extract from the 'Regulations for the government of all persons attached to the Naval service of the United States,' August 7, 1876, chap. iv. § vi. :—

17. Should a Minister or a Chargé d'Affaires of the United States die in a foreign port, where one or more vessels of the United States are present, the senior officer present will request permission of the authorities to land an escort ; as many officers as can be spared from duty will attend the funeral, in undress uniform, and eight petty officers will be landed as body bearers. The colours of the vessels present are to be kept at half-mast from 8 A.M. of the day of the funeral to the time of interment, and the same number of cannons are to be fired, as minute guns, as the official was entitled to as a salute while living, the firing to commence on the starting of the funeral *cortège*.

18. The same ceremony will be observed for consuls and consular agents of the United States ; no cannon, however, will be fired, but three volleys of musketry are to be fired over the grave, if permitted by the authorities.

19. Funeral processions will shove off in the following order :—1st, music and firing party ; 2nd, boat with chaplain ; 3rd, boat carrying the corpse and body-bearers ; 4th, boats with pall-bearers ; 5th, boats with officers of the ship to which the deceased was attached ; 6th, boats from other vessels of the United States, in the inverse order of the rank of commanding officers ; 7th, boats from foreign ships, arranged from van to rear in the inverse order of the rank of their several senior officers, and when such seniors are of the same grade, then length of service on the station will decide relative positions. If the deceased be a commander of a squadron or of a single vessel, his flag or pennant will be carried at half-mast in the bow of the boat containing the coffin.

20. The firing party is to be composed of marines, and the seamen landed are not to be armed. The colours, draped, are not to be carried in the procession, and in case it be the funeral of an officer commanding a squadron or vessel, his flag or pennant is to be similarly dressed and carried. All drums should be covered with black crape or serge, and muffled.

21. On reaching the shore, the procession is to be formed under the command of an officer senior to the officers commanding the firing party and the details of men from different vessels who are to form a part of the



procession. The order of formation will be as follows :—Music, firing party, chaplain, pall or hearse, men from different vessels in squads commanded by their own officers, officers of the vessel to which the deceased was attached, juniors leading, officers from the fleet or squadron, juniors leading, foreign officers, arranged as directed for procession in boats.

24. The officer in charge of the procession will, through the officer detailed to receive foreign officers, invite the senior of each of these delegations to designate one of his party to act as pall-bearer, and those thus selected will march, one with each of the pall-bearers.

25. The procession will march to the grave in common time, and the escort will return in quick time.

## CHAPTER XI.

## OF CONSULS AND COMMERCIAL AGENTS.

1. Origin of the institution of consuls—2. Objects of consulates in modern times—3. Divisions of the consular organisation—4. Commissions and exequaturs—5. Consuls have no representative or diplomatic character—6. Are subject to local jurisdiction—7. Have no rank except among themselves—8. Enjoy certain privileges and exemptions—9. The office to be distinguished from the personal status of the officer—10. If exequatur be issued to a citizen without conditions—11. Opinions of text-writers—12. U. S. laws respecting foreign consuls—13. Duties and powers respecting their own countrymen—14. They have no civil or criminal jurisdiction—15. The granting of passports—16. Certificates, acknowledgements, &c.—17. Can afford no refuge from civil process—18. Engaging in trade—19. Judicial decisions on public character of consuls—20. Powers and privileges extended by treaty and municipal law—21. Consuls of Christian States in the East—22. Origin of difference of powers—23. Same system extended to China—24. Treaty between Great Britain and China—25. Act of parliament—26. British orders and instructions—27. Treaty between France and China—28. French laws and regulations—29. Treaty between the U. S. and China—30. Remarks of U. S. commissioner on this treaty—31. Act of congress for carrying it into effect—32. Decree of U. S. Commissioner in China—33. Controversies between subjects of foreign States in China—34. Mr. Cushing's opinion on this subject.

§ 1. THE institution of a foreign consulate originated in the earlier part of the middle ages, in sending officers or persons from one country or city to the seaports and towns of foreign States, for the purpose of protecting the national commerce, especially in matters of shipwreck and of adjusting disputes between sailors and merchants of their own country. In the absence of regular ambassadors, or other public ministers, these commercial agents sometimes acted in the capacity of representatives and diplomatic agents of their respective States, and not unfrequently assumed and exercised jurisdiction and authority over the merchants and citizens of their own countries in foreign ports and cities. In the ports of the Baltic and Mediterranean, where foreigners were compelled to live in particular quarters of the town, they sometimes



exercised great power over their own countrymen, and were designated by various titles, according to the customs of various countries.<sup>1</sup>

§ 2. In the early part of the seventeenth century a great change was effected in commerce and international intercourse generally, by the establishment of permanent diplomatic agencies and legations, by the general improvement of municipal law, and especially by more clearly defining the boundaries and limits of territorial and foreign jurisdictions. The extra-territorial jurisdiction, criminal and civil, exercised by consuls, was found to be wholly at variance with the recognised principles of public law in Christian Europe, and the consular institution, thus changed in its condition and character, was limited to a general vigilance of the consul over the interests of shipping and navigation of his nation at a particular locality. To this was sometimes added a limited authority over particular questions of dispute between merchants and sailors of his own country. This is the general position which, in Christian countries, the consulate continues to occupy at the present day. The duties and legal *status* of consuls, as will be shown hereafter, are somewhat different in the East, where, by virtue of express treaty stipulations, they have especial prerogatives and exercise a larger jurisdiction.<sup>2</sup>

<sup>1</sup> The ships of foreign merchants were held to be navigated under the jurisdiction of the nation whose flag they carried, and the general practice was for vessels engaged in long sea voyages, some of which occupied a period of not less than three years, to have on board a magistrate whose duty it was to administer the law of the country of the flag amongst all on board, not merely whilst the vessel was on the high seas, but while she was in a foreign port, loading or unloading cargo. This magistrate was termed the Alderman in the ports of the Baltic and the North Sea, whilst in the Mediterranean ports he was designated by the familiar name of Consul, and was the precursor of the resident commercial Consul, who continues in the present day to exercise within merchant ships of his own nationality, notwithstanding they are within the territorial jurisdiction of another State, a portion of the personal jurisdiction formerly exercised by the ship's consul. The exercise of this consular jurisdiction requires no fiction of extraterritoriality to support it. Its limits are either regulated by commercial treaties, or where it has originated in charter privileges, it is now held to rest upon custom.—Art. by Sir T. Twiss, *Law Magazine*, Feb., 1876.

<sup>2</sup> Heffter, *Droit International*, § 244; Phillimore, *On Int. Law*, vol. ii. §§ 243, 244; Miltitz, *Manuel des Consuls*, tome i. p. 6; Martens, *Guide Diplomatique*, §§ 71, 72; Martens, *Précis du Droit des Gens*, §§ 147, 148; Gardén, *De la Diplomatie*, tome i. pp. 315 et seq.; De Clercq, *Guide des Consuls*, pp. 1 et seq.; Bello, *Derecho Internacional*, pt. i. cap. vii. § 1; Moreuil, *Manuel des Agents Con.*, introduction; Mensch, *Manuel*

§ 3. The consular organisation is usually divided into consuls-general, consuls, vice-consuls, and consular or commercial agents. Some States have only the single office of consuls. Consuls-general exercise their functions over several places, and sometimes over a whole country, giving orders and directions to all consuls, vice-consuls, and commercial agents of their government within the same State. English vice-consuls are usually appointed by the consul, subject to the approbation of the foreign secretary of State. Other countries have adopted a different system of appointment. This depends entirely upon the institutions of the particular State, and is not governed by any rule of international jurisprudence. It is sufficient for the State, to which the consular officer is sent, to know that he has been appointed by the proper authority of his own government. By whatever names these officers are designated, their powers and duties in Christian countries are, generally speaking, the same; these we shall now proceed to discuss under the general name of *consul*.

§ 4. A consul receives a commission from the proper authority of his own government, a duplicate, or properly authenticated copy, being forwarded to the ambassador or minister of the same State, at the court of the country in which the consul is to officiate, in order that he may apply for the usual *exequatur* to enable him to enter officially upon his consular duties. This is usually issued under the great seal of State, and made public for the information of all concerned. On arriving at his post, the consul usually furnishes the principal public authority of the place with a copy of his commission, stamped with his consular seal. On receiving his *exequatur* he becomes entitled to exercise the authority, and enjoy the privileges, immunities, and exemptions due and pertaining to his office. Without such *exequatur*, or confirmation of their commission by the sovereign authority of the country to which they are deputed, they cannot enter upon the discharge of their functions; and, on its revocation by

*du Consulat*, pt. i.; Riquelme, *Derecho Pub. Int.*, lib. ii. cap. Ad., iii.; Dalloz, *Répertoire*, verb. 'Consul,' § 1; Warden, *Treatise on Consuls*; Borel, *Fonctions des Consuls*; Santos et Barreto, *Traité du Consulat*; Bursotti, *Guide des Agents Consulaires*; De Podio, *Jurisdiction des Consuls*; Bynkershoek, *De Foro Legat.*, lib. v. cap. x.; Vattel, *Droit des Gens*, liv. ii. ch. ii. § 34.



such sovereign authority, their official character immediately ceases.<sup>1</sup>

§ 5. Consuls have neither the representative nor diplomatic character of public ministers. They have no right of ex-territoriality, and therefore cannot claim either for themselves, their families, houses, or property, the privileges of exemption which, by this fiction of law, are accorded to diplomatic agents who are considered as representing, in a greater or less degree, the sovereignty of the State which appoints them. They, however, are officers of a foreign State, and when recognised as such by the *exequatur* of the State in which they exercise their functions, they are under the special protection of the law of nations. Consuls are sometimes made also *chargés d'affaires*, in which cases they are furnished with credentials, and enjoy diplomatic privileges; but these result only from their character as *chargés*, and not as consuls.<sup>2</sup>

§ 6. Consuls are amenable, generally, to the civil and criminal jurisdiction of the country in which they reside, and their property and effects are subject to the recourse of execution and process of the local courts. It was at one time contended that they should be exempt from criminal jurisdiction, but the position was neither sustained in practice, nor in the doctrines of text-writers. They, therefore, may either be punished for their offences, by the laws of the State where they reside, or be sent back to their own country, at the discretion of the government which they have offended. A distinction, however, is made between personal offences and official acts done under the authority and direction of their own government. The latter are matters for diplomatic arrangement between the respective States, and are not properly justiciable by the local courts. Consuls are subject to the payment of taxes, and municipal imposts and duties on their property or trade, and the municipal charges incident to

<sup>1</sup> Fynn, *British Consuls Abroad*, pp. 34-55; Wildman, *Int. Law*, vol. i. p. 130; Horne, *On Diplomacy*, sec. i. §§ 13, 14; De Cussy, *Reg. Consulaires*, pt. i. sec. i.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 44; Foelix, *Droit Int. Privé*, § 218; Flassan, *Hist. de la Dip. Française*, tome i. ch. ix.; Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 22; Westlake, *Private Int. Law*, § 139.

Mr. Pritchard, the acting British Consul at Tahiti, having been imprisoned in 1844 by order of the French commander of that island, although without the authority of the French Government, the latter was compelled by Great Britain to pay a sum of money as indemnity for the outrage.—*Ann. Reg.*, 1844, p. 261.

their personal *status*, and from which they are not exempted by the privileges of their office.<sup>1</sup>

§ 7. 'Consuls,' says Phillimore, 'have no claim to any foreign ceremonial or mark of respect, and no right of precedence, except among themselves, according to the rank of the different States to which they belong.' But, as already stated, the present tendency is to consider all sovereign and independent States as equal in rank, with respect to ceremonial and precedence, and consuls of foreign States of the same rank in the consular hierarchy should have precedence among themselves, according to the dates of their respective *exequaturs*. The rank which they hold among the officers of their own State, civil or military, is regulated by the laws of their own State, and is not a matter of international jurisprudence, nor does it come within the province of the State where they reside to interfere in any differences between officers of a foreign government, with respect either to relative rank among themselves, or to their authority over each other.<sup>2</sup>

<sup>1</sup> Wicquefort, *De l'Ambassadeur*, liv. i. § 5; Clark *v.* Cretico, 1 *Taunt. R.*, 106.

<sup>2</sup> Phillimore, *On Int. Law*, vol. ii. § 246. British Consular Officers take rank in their respective grades among their colleagues at the port of their residence, in conformity with the rules prescribed by the Congress of Vienna for diplomatic agents, viz., seniority according to official title and to priority of recognition. The rights and privileges of Consular Officers are of two kinds: those defined by treaty and those regulated by local law or custom. Consular Officers should maintain their right to privileges or exemptions which by treaty or by custom they may be fully entitled to demand, but they must not aim at more; and in any case of difference of opinion between them and the officers of other Governments, they must avoid giving offence and should conduct the controversy in a spirit of conciliation calculated to render unnecessary the reference which, if the difference cannot be arranged, must be made by the Consular Officer to the British Secretary of State.

In the countries where it may be the custom for foreign Consuls to hoist the national flags of their respective nations over their residences, the flag to be hoisted by British Consular Officers is the Union Jack.

If the regulations of the country or of the place in which the Consular Officer resides do not permit a display of this kind, and if such regulations are applicable to foreign Consuls generally, the British Consular Officer should not hoist the British flag. *Brit. F. O. Inst.*, 1868.

The interchange of visits in foreign ports between British Naval Officers and British Consuls is arranged as follows:—

On arrival of a British ship of war at a foreign port, the first visit is made by the Naval or Consular Officer who may be subordinate in relative rank; but the senior Naval Officer present is on all occasions to arrange to provide a suitable boat for Consular Officers to pay their official visits afloat, and to reland them, on the said officers notifying their wish to have a boat sent for their accommodation.



§ 8. Although consuls do not enjoy the rights accorded by the law of nations to public ministers, they are, nevertheless, entitled to certain rights of comity, and to certain privileges of exemption from local and political obligations, which cannot be claimed by private individuals,—rights and privileges which are incident to their office, and which result from their character as the duly appointed and recognised officers of a foreign State. Nor are these exemptions limited to the officers themselves; they extend, in a certain degree, to their houses and to public property in their charge. Thus they may raise the flag, and place the arms of the country they represent over their gates and doors; and, although their houses are liable to domiciliary visit and search, the papers and archives of their consulate are, in general, exempt from seizure or detention, and soldiers cannot be quartered in their consular residence. And, in addition to those rights and privileges to which consuls are entitled by the general rules of international law, custom, in some countries, has added others of the same kind; and in general, a consul is entitled to all those which have been allowed to his predecessors, unless a formal notice has been given that they will no longer be extended to his office, or to consuls of other States in the

The above ceremonial is dependent on the relative rank accorded to certain Naval and Consular Officers, and such relative rank having undergone several changes since the Naval Regulations were established, the following scale of precedence between Naval and Consular Officers has been substituted :—

Agents and Consuls-General . . . . .	To rank with, but after, Rear-Admirals.
Consuls-General . . . . .	„ with, but after, Commodores.
Consuls . . . . .	„ with, but after, Captains R.N. of 3 years' standing and before all other Captains R.N.
Vice-Consuls . . . . .	„ with, but after Lieutenants and Navigating Lieutenants of 8 years' standing.
Consular Agents . . . . .	„ with, but after, all other Lieutenants, and Navigating Lieutenants R.N.

The Consular Officers of the United States rank with their own Naval Officers, as follows :—

Agents and Consuls-General . . . . .	} with Commodores.
Consuls-General . . . . .	
Consuls . . . . .	} with Captains.
Vice-Consuls . . . . .	
Deputy-Consuls . . . . .	} with Lieutenants.
Consular Agents . . . . .	
Commercial Agents . . . . .	

country where he resides. To grant privileges and immunities to consuls of one country, which are not allowed to those of another, may give just cause of complaint. It, however, is necessary to distinguish between what they are absolutely entitled to by the rules of international law, and what is sometimes allowed as a matter of comity, or conceded by treaty stipulations.<sup>1</sup>

<sup>1</sup> The following extracts are taken from the 'Regulations prescribed for the Consular service of the United States' (Washington, Oct. 1, 1870):—

*Classes of Consular Officers.*

1. The Consular Service of the United States consists of Agents and Consuls-General, Consuls-General, Vice-Consuls-General, Deputy-Consuls-General, Consuls, Vice-Consuls, Deputy-Consuls, Consular Agents, Commercial Agents, Vice-Commercial Agents, Consular Clerks, and Office Clerks. The latter class is authorised by law only in unsalaried Consulates and will not be recognised by the Department of State, unless special permission is obtained.

*Vice-Consuls.*

10. Vice-Consuls are defined by the statute to be 'Consular Officers who shall be substituted temporarily to fill the place of Consuls, when these shall be temporarily absent or relieved from duty.' It follows that when the Consul is present at his post, the Vice-Consul has no functions or powers. The same remarks apply *mutatis mutandis* to Vice-Consuls-General and Vice-Commercial Agents.

*The Privileges of Consular Officers under the law of Nations.*

21. In the absence of International agreement, Consuls as such have no representative or diplomatic character, have no right of extraterritoriality, and cannot claim either for themselves, their families, houses or property, the privileges of exemption which are accorded to diplomatic agents.

22. They are however, after the granting of an *exequatur*, officers of a foreign State and under the special protection of the law of nations. They may raise the flag and place the arms of the United States over their gates and doors. The actual papers and archives of the Consulate are exempt from seizure and detention. If they are citizens of the United States and do not hold real estate or engage in business in the country to which they are sent, they will be exempt from the performance of such personal duties towards the local Government as may interfere with the performance of their consular duties.

23. A Consul should claim to enjoy all the rights and privileges which have been allowed to his predecessors, unless a formal notice has been given that they will no longer be extended to his office or to Consuls of other States in the country in which he resides. He should also claim to enjoy all the immunities which are allowed to Consuls of other countries, unless such other Consuls are entitled to such extraordinary immunities by special treaty stipulations.

*The privileges and powers of Consular Officers of the United States under treaties and conventions with Foreign Powers.*

24. The Consul must bear in mind that in the following abstract it is impossible to do more than allude in a general way to the rights and privileges secured by treaties. The several treaties and conventions alluded to may be found in Appendix No. 1, and in each case the Con-



§ 9. It is conceded that, so far as the law of nations has established fixed rules with respect to consular exemptions, the subject is withdrawn from the domain of municipal juris-

sul must look there for more detailed information. It is also possible that more extended rights may have been granted to Consuls of other Nations, and that the Officers of the United States may be entitled to claim them under the clause known as 'the most favoured nation clause' in a treaty of the United States. The Department must necessarily trust to the discretion of the Consul, on the one hand not to permit his rights to be invaded without protest, nor on the other hand to claim what he cannot maintain. If the rights thus secured by treaty are in any case invaded or violated, the Consul will at once complain to the local authorities, to the Department, and to his immediate superior. These complaints should set forth in full all the facts showing the invasion or violation.

*Inviolability of the Archives and Papers of the Consulate.*

25. This is secured by treaties with the Argentine Republic, Bolivia, Belgium, Denmark, Ecuador, Greece, Guatemala, Hayti, Mexico, the Netherlands, Portugal, Salvador, Sweden and Norway, Switzerland, the Dominican Republic, Muscat, and New Granada.

*Inviolability of the Consular Office and Dwelling.*

26. This is secured by treaties with Belgium, France, Italy, and Muscat, but the dwelling cannot be used as an asylum.

*Exemption from Arrest.*

27. By conventions with Belgium, France, and Italy, the Consul is exempted from arrest except for crimes. By treaty with Turkey he is entitled to suitable distinction and necessary aid and protection. In Muscat he enjoys the inviolability of a diplomatic officer.

*Exemption from liability to appear as a Witness.*

28. This is secured by conventions with Belgium, France, and Italy. In such case the testimony may be taken in writing at his dwelling. If the Consul claims this privilege, he should offer to give his evidence in the form prescribed by the convention, and should throw no impediment in the way of the proper administration of justice in the country of his official residence.

*Exemption from Taxation.*

29. When a Consul is not a citizen of the country in which the Consulate is situated, and does not own property therein, and is not engaged in business therein, he is secure against the liability to taxation, by treaties or conventions with Belgium, Bolivia, Denmark, Ecuador, France, Guatemala, Hayti, Italy, the Netherlands, Salvador, and New Granada.

*Exemption from Military Service.*

30. If not citizens of the country of their Consular residence or domiciled at the time of the appointment in it, this exemption is secured by conventions with Belgium, Denmark, France, Guatemala, Italy, Mexico, the Netherlands, Salvador, and New Granada. In New Granada the exemption also extends to officers, secretaries and attachés.

*Infraction of Treaties.*

31. The right in such case to correspond with the local authorities is secured by conventions with Belgium, France, Italy, and New Granada.

prudence, and the officer may claim all the rights and privileges which are accorded to him by that general and higher code under the protection of which his office is placed. But

*The Right to Exhibit the National Arms and Flag.*

32. This is given by conventions with Belgium, France, Italy, the Netherlands, and New Granada.

*Depositions.*

33. The right to take depositions is secured by conventions with Belgium, France, Italy, and New Granada.

*Jurisdiction over Disputes between Masters, Officers, and Crew.*

34. Exclusive Jurisdiction over such disputes in the vessels of the United States, including questions of wages, &c., is conferred by treaties or conventions with Belgium, Denmark, France, Greece, Italy, the Netherlands, Prussia, Portugal, Russia, Sweden and Norway, Dominican Republic, Bremen, Hanover, Mecklenburgh-Schwerin, Tripoli, and New Granada.

*Right to Reclaim Deserters.*

35. The right to reclaim deserters from the vessels of the United States is conferred by treaties or conventions with Bolivia, Belgium, Denmark, Ecuador, France, Greece, Guatemala, Hawaiian Islands, Hayti, Italy, Japan, Mexico, Madagascar, the Netherlands, Prussia, Portugal, Russia, Salvador, Sweden and Norway, Dominican Republic, Siam, Hanover, Mecklenburgh-Schwerin, and New Granada.

*Salvage.*

36. The right to settle salvage for damages at sea is conferred by conventions with Belgium, France, the Netherlands, Hawaii, Italy, Madagascar, Turkey, and New Granada. The parties may, however, by agreement deprive the Consul of this jurisdiction.

*Estates of Citizens of the United States deceased.*

37. By treaties with Morocco, Muscat, Nicaragua, Paraguay, Tripoli, China, Japan, Tunis, New Granada, and Persia, Consuls are entitled to the custody of the property of the citizens of the United States dying within the limits of their respective Consulates.

*Jurisdiction over Offences and Crimes.*

38. The jurisdiction over crimes and offences committed by citizens of the United States is conferred by treaties with China, Japan, Madagascar, Siam, and Borneo. In Morocco, Muscat, Tripoli, Tunis, and Persia, the Consuls are empowered to assist in the trials of citizens of the United States accused of murder or assault.

*Civil Jurisdiction.*

39. Jurisdiction over civil disputes is conferred by treaties with China, Japan, Turkey, Madagascar, Siam, Borneo, Morocco, Muscat, Persia, Tripoli, and Tunis. This jurisdiction is exclusive in disputes between citizens of the United States. In Japan it extends to claims of Japanese against Americans. In China and Siam the jurisdiction is joint in controversies between Americans and Chinese or Siamese.

In Madagascar the exclusive jurisdiction extends to disputes between the citizens of the United States and subjects of Madagascar. In Turkey there can be no hearing in a dispute between Turks and Americans unless the dragoman of the Consulate is present.



there has been much difference of opinion among writers on international law, respecting what rights and exemptions are accorded to consuls by that code. This difference of opinion, however, seems to have arisen, in a great degree, from not distinguishing between those which result from the personal *status* of the officer, and those which pertain to the office, and, with respect to the latter, between those which are conceded by treaty or municipal law, and those which are established by the positive law of nations, or the general rules of international comity. In considering their rights and privileges of exemption, consuls may be divided into three distinct classes: first, those of foreign birth sent to a country especially as consuls, who owe no allegiance to the State where they reside, and who hold no property, engage in no business, and have no residence there, other than their official one; second, those of foreign birth and allegiance, who hold property, engage in business, and have a fixed residence in the country; and third, those who are citizens and residents of the country in which they exercise the functions of the consular office, under a foreign government. It is manifest that the rights and privileges of these different classes of persons must be essentially different, and according to the personal *status* of each. Nevertheless, all must alike have certain rights and privileges which belong to the *office* which they hold, and which are independent of the character of the indi-

The following is a list of the treaties and conventions (referred to in Regulation 24, above) which have been made by the United States with:—

Argentine Republic .....	1853	Mexico .....	1831
Belgium .....	1868	Morocco .....	1836
Borneo .....	1856	Muscat .....	1833
Bolivia .....	1858	Netherlands.....	1839, 1855
Bremen .....	1852	Nicaragua .....	1867
China.....	1844-1868	New Granada .....	1850
Denmark .....	1826-1861	Paraguay .....	1859
Dominican Republic .....	1867	Persia .....	1856
Ecuador .....	1839	Portugal .....	1840
France .....	1853	Prussia .....	1828
Greece .....	1837	Russia .....	1832
Guatemala .....	1852	Salvador .....	1850
Hanover.....	1846	Siam .....	1856
Hawaii .....	1849	Switzerland.....	1850
Hayti .....	1864	Sweden and Norway .....	1827
Italy .....	1868	Tripoli.....	1805
Japan.....	1854, 1857, 1858	Tunis .....	1797
Madagascar .....	1867	Turkey .....	1830
Mecklenburgh-Schwerin .....	1849		

vidual incumbent. A neglect of this distinction has led to much of the conflict of opinion among publicists; it must, however, be admitted that there is not an entire uniformity of opinion among those who make the proper distinction between the office and the person. And, indeed, this could hardly be expected, for upon nearly every important question of international law text-writers have held different doctrines. Nevertheless, it is not difficult to deduce from their several reasonings, and the authorities to which they refer, some general and fundamental principle, which will serve to guide us in the determination of a particular case.<sup>1</sup>

§ 10. There seems to be little or no difficulty in distinguishing between the exemptions of the different classes of foreign consuls who owe no allegiance to the State in which they reside. Those who hold no property, engage in no business, and have no domicile in the country, have the personal exemptions and disabilities of aliens who are mere sojourners. Those who hold real estate, engage in business, and have a fixed residence, are considered as foreigners domiciled in the country, and their consular privileges, or the privileges which pertain to their office, whatever they may be, do not extend to their property or trade so as to change its national character. As neither of these classes owe personal allegiance to the country in which they reside, there can be no conflict between the duties of their allegiance and the duties of their office. But where citizens of the country exercise the functions of foreign consuls, there may be such conflict, and it becomes material to ascertain how far the office which they hold exempts them from the performance of the political and municipal duties of citizens. It is evident that they can claim none of the exemptions which the other two classes enjoy in virtue of the personal *status* as aliens; but it is believed that they are entitled to those which pertain to their office, and which are necessary for the due performance of its duties. It has been stated, in the preceding chapter, that where a public minister owes allegiance to the State to which he is accredited, such State may refuse to receive him, except on condition of his renouncing any claim

<sup>1</sup> Wicquefort, *De l'Ambassadeur*, liv. i. § 5; Garden, *De la Diplomatie*, tome i. p. 323; Martens, *Guide Diplomatique*, tome i. § 74; De Clercq, *Guide des Consulats*, liv. i. ch. i. § 4; Mensch, *Guide du Consulat*, pt. i. ch. iv.; Riquelme, *Derecho Púb. Int.*, lib. ii, cap. Ad., iii.



to be exempt from local jurisdiction, and that, on making such renouncement, he loses his right of ex-territoriality, but if he be received without conditions, he has the same rights as though he owed no allegiance to the State which receives him. It is true that consuls have no right of ex-territoriality, but they have certain rights and privileges which pertain to their office and which are accorded to them by the law of nations, just as much as the right of ex-territoriality belongs and is accorded to a public minister. Where a citizen of a State is appointed to a foreign consulate in the State, it is optional with his government to refuse to permit him to hold the office, or to attach conditions to his holding it. But suppose he be recognised as such consul without any conditions. Reason and analogy would lead us to the conclusion that, if no conditions are imposed in the *exequatur*, the citizen who is consul of a foreign State is entitled, as much as an alien consul, to the privileges and exemptions which necessarily pertain to that office; and it is believed that this conclusion is sustained by the authority of text-writers. The difficulty is to determine what privileges and exemptions properly pertain to the office of consul, or are necessary for the due performance of its duties.

§ 11. The consulate, as it now exists in Christian countries, being of modern origin, and having, in a measure, grown up with the development of commerce, we cannot expect to find, in the older works on international law, any very clear discussion of the duties and privileges which pertain to the consular office. On this point we must look mainly to the writings of more recent publicists, and even these are very far from satisfactory, the opinions and doctrines which they announce being often conflicting and sometimes totally irreconcilable. Horne says that consuls, whether aliens or subjects of the State in which they reside, 'enjoy exemption from taxes and personal services, and their houses are exempt from the burthen of lodging troops.' He also says that citizens cannot accept a consulate of a foreign power without the permission of their own government, but that, having received such permission, they cease, temporarily, to be subjects of the prince in whose territory they reside. This last doctrine is not sustained by the authorities to which he refers, nor is he correct in stating that consuls are exempt from

taxes. Mr. Cushing has gone to the opposite extreme, with respect to citizens who hold consulates of foreign States. It is true that his argument has reference only to their liability to do militia and jury duties, but his doctrine is, that they are exempt from no municipal duty, unless exempted by the local laws of their own State. The more correct and reasonable rule is that laid down by Garden. He says: 'Consuls are under the protection of the law of nations; they, undoubtedly, do not enjoy the rights accorded to envoys; they may be subjects of the State where they reside; they are subject to its jurisdiction, to its police, to imposts, *but they cannot be denied the privileges necessary to the performance of their office.* The consul, therefore, cannot be made liable to civil charges which would prevent him from the performance of his functions.' With respect to jury and military duty, their right of exemption depends entirely upon the question whether such duties would interfere with the due performance of their consular functions. On this point Baron Charles de Martens, speaking of consuls who do not owe allegiance, hold no real estate, and have no business in the State where they reside, says that they are exempt from service in the civic or municipal guard, and from contributions for that service; and, with respect to those who hold real estate, or engage in trade in the country, or are its subjects and residents, he says they may, if they demand it, be exempted from personal service in the national guard, although, if necessary, they may be required to provide a substitute. De Clercq says that consuls are exempt from service in the national guard, when they are citizens of the State which they represent, and that jurisprudence tends to exempt them from it, even when citizens of the State where they reside. The same opinion is expressed by Mensch and others, viz.: that consuls must be regarded as exempt from services purely *personal*, which interfere with their *consular* duties. We are of the opinion that jury and militia duty come within the rule of exemption so clearly laid down by Garden. The duties of a jurymen might require the officer to go a considerable distance from his consulate, and prevent him, for days and weeks, from performing the functions of his office. It is still worse with respect to militia duty, and especially in the United States, where militia service in a State would render him liable to be mustered into the ser-



vice of the general government, and take him a great distance, and for a long time, from his consulate. Certainly this would be an interference with his performing the duties of his office. Again, the same principle which would require him to perform jury and militia duty, would require him to perform the duties of other municipal offices. In many countries the acceptance of such offices is obligatory upon the citizen, and, as their terms are sometimes for years, the performance of their duties would absolutely and totally preclude the performance of the duties of a consulate. Undoubtedly a State may impose these duties upon any and all of its citizens; but if it consents that one of them may hold a foreign consulate, it parts with this right, so far as that citizen is concerned, until it revokes the *exequatur* which it has granted. Its right to refuse the *exequatur*, in the first instance, or to revoke it at any time afterward, is universally conceded.<sup>1</sup>

§ 12. The federal legislation, on the subject of foreign consuls in the United States, so far as it has gone, accords with the general spirit of international jurisprudence, as announced by the doctrines of the best writers. The ninth section of article first of the constitution disqualifies a person from holding, at the same time, without the consent of congress, an office under the federal government, and under any foreign prince or State. And the second section of article third accords to every foreign consul the privilege of being sued in the federal courts; and the ninth section of the judiciary act of 1789 gives to the federal courts *exclusive* jurisdiction of all suits against consuls and vice-consuls, with certain exceptions, enumerated in the act. It has been decided that these privileges comprehend foreign consuls, who are also citizens, and, also, that where a foreign consul is sued jointly with others, it brings his co-defendants within the jurisdiction of the federal courts, by unavoidable implication. The object of this exclusion of the State courts, says the New York court of appeals, is not to exempt a consul from liability to respond to his creditors, or to answer for his misconduct, but to keep within the control of the federal government, and subject to the authority of its courts, all cases and controversies which

<sup>1</sup> Horne, *On Diplomacy*, sec. i. § 13; Martens, *Guide Diplomatique*, tome i. § 74; Gardien, *De la Diplomatie*, tome i. p. 323; De Clercq, *Guide Pratique*, liv. i. ch. i. § 4; Cushing, *Opinions U. S. Att'ys Genl.*, vol. viii. p. 169; Mensch, *Guide du Consulat*, pt. i. ch. iv.

might in any degree affect our foreign relations. Mr. Cushing argues that, inasmuch as citizens holding foreign consulates are not specially exempted by the constitution, or any act of congress, from service in the militia or on juries, they must be considered liable to such services, unless so exempted by the statutes of the States of the union in which they respectively reside. But this conclusion is too broad; the same course of reasoning would prove the liability of public ministers, and of officers of the federal government, to the same service. He admits, however, that so far as consuls are exempted by the law of nations, or by the rules of international comity, the subject is withdrawn from the domain of municipal jurisprudence. The convention between the United States and France, of February 23rd, 1853, places the consuls of the respective countries, so far as this question is concerned, upon a footing conformable to the spirit of international jurisprudence. It stipulates that the consuls of the respective countries shall enjoy 'exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature, and from all direct and personal taxation, whether federal, State, or municipal.' But if they are citizens of the country where they reside, or become owners of property, or engage in trade there, they are then to be subject to the same taxes and imposts, and, save in matters appertaining to their consular functions, to the same jurisdiction as citizens of the country who are proprietors or merchants.<sup>1</sup>

§ 13. The duties of consuls are regulated, in a great measure, by the laws of their own country, subject, of course, to the general principles of international jurisprudence. Thus, although, according to the doctrine laid down in the preceding paragraphs, they can exercise no contentious jurisdiction over their fellow countrymen without the express permission of the State in which they reside, they are, nevertheless, allowed a sort of voluntary jurisdiction—a power of arbitration in certain kinds of disputes, more especially those relating to matters of commerce. For example, in difficulties between the captain and seamen of a merchant vessel of his own country, the consul may be empowered by his own State to discharge a sea-

<sup>1</sup> Cushing, *Opinions U. S. Att'ys Genl.*, vol. vi. p. 409; vol. viii. p. 169; Davis *v. Packard*, 7 *Peter R.*, 276; Valarino *v. Thompson*, 3 *Selden R.*, 577; Mannhardt *v. Soderstrom* 1 *Binney R.*, 138.



man for cruel treatment or other sufficient cause, and such discharge, though not binding upon the tribunals of the place of his residence, would be so upon those of his own country. The same may be said of commercial disputes between the captain and supercargo, between them and the consignees, or between the consignees themselves. But these special powers of a consul belong rather to the municipal laws of his own State than to international jurisprudence.<sup>1</sup>

<sup>1</sup> The principal duties of the British Consul are those enjoined by the Consular Act, 6 Geo. IV., c. 87; by the Acts relating to the Slave Trade, 5 Geo. IV., c. 113, 6 and 7 Vict., c. 98; by the Acts relating to the Mercantile Marine, viz. 17 and 18 Vict., c. 104, 18 and 19 Vict., c. 91, 25 and 26 Vict., c. 63, 30 and 31 Vict., c. 124. There are other duties which will be mentioned below.

Some sections of the Consular Act have been repealed or have been altered by order in Council.

One object of the Act was to preclude Consular Officers from being maintained, to a great extent, by fees and gratuities previously levied by them from masters of British ships; but the Act provides that certain fees shall still be leviable by Consular Officers, and these are enumerated in the Tables of Fees annexed to the Order in Council of May 1, 1855.

A subsequent Order in Council of July 27, 1863, provides for a slight variation as regards the Levant. The fees so leviable are not to be considered as the property of the Consular Officer, unless the Secretary of State allows him to appropriate them to his own use.

The fifth section of the Act provides a penalty for demanding higher or other fees than those specified in the Tables above mentioned; but Consular Officers who levy fees on account of Her Majesty's Government are not at liberty to forego the payment of any fees legally leviable, except by express permission from the Secretary of State.

The seventh section of the Act requires that the Tables of Fees be hung up in the public room of every Consulate.

Special fees are leviable by Consular Officers who are provided with warrants under the Act for facilitating the marriages of British subjects abroad (12 and 13 Vict., c. 68).

Every year all Consular Officers are to make a return of the fees levied at their Consulate.

The tenth and five subsequent sections of the Act relate to churches, hospitals, and burial-grounds; but these apply only to certain Consular stations, and instructions as regards carrying those sections into effect are given to Consular Officers when necessary.

The eighteenth section allows Consuls to relieve shipwrecked and distressed British subjects, but their powers in this respect are limited to what they may be authorised to do under instructions from the British Government. A special distinction is made between persons who come under the classes of seafaring or non-seafaring British subjects.

The twentieth section empowers Consuls-General and Consuls to administer oaths and to act as notaries, and the Act 18 and 19 Vict., cap. 42, extends this power to Consular Officers of other ranks. See also 15 and 16 Vict., c. 86, § 22.

Whatever measures of quarantine may be adopted within the district of any British Consular Officer should immediately be made known by him to the Secretary of State, and to any British Naval, Military, or Colonial authority who may be within reach, and he should equally report the

§ 14. As consuls, in Christian countries, do not enjoy the privileges of ex-territoriality, and have no jurisdiction over their own countrymen, (unless conceded by treaty,) which is recognised by international law, it follows that all exercise of such jurisdiction, even by consent of parties, produces no effect in foreign tribunals, whatever it may have in those of their own State. Thus, marriages and divorces by consuls are not valid in international law, nor, as a general rule, even in their own countries, for, as the consul has no ex-territoriality, and is not an officer of the local government, the marriage contract, or its dissolution, is not made by the *lex loci*, either of the country where the parties are, or of that to which they belong.<sup>1</sup> It has, therefore, been held by the Attorney-General

appearance of any fever or disease having a contagious or infectious character, and whether affecting human or animal life.

Whenever British Consular Officers have reason to believe that there are any next of kin, in England or elsewhere, to deceased British subjects dying abroad, they should communicate in the first instance with those persons.

<sup>1</sup> By virtue of the Act 12 and 13 Vict., c. 68, British Consuls-General, Consuls,—or any person duly authorised to act in the absence of such Consul,—Vice-Consuls, and Consular Agents, may, subject to the rules therein laid down, solemnise marriages in foreign countries between persons, both or one of whom are British subjects, provided the Consular Officers shall have previously received a warrant from the Secretary of State specially authorizing them to solemnize and register marriages, or to allow marriages to be performed in their presence. No other persons whatsoever are qualified by the Act to solemnize marriages, or to allow them to be solemnized by any other person in their presence.

Any form of ceremony, according to the creed of the contracting parties, may be used; and the religious portion of the ceremony may be performed by a clergyman of any denomination, but the presence of the duly authorized Consular Officer is necessary to render such marriage valid: and if the ceremonial be not that of the Church of England and Ireland, which can only be duly performed by an ordained clergyman of that Church, the contracting parties are to make a declaration before the Consul, in words prescribed by the Act, that they know not of any lawful impediment why they may not be joined in matrimony, and that they call upon the persons present to witness that they take each other respectively to be lawfully wedded husband and wife; and such declaration in the absence of any religious ceremony is sufficient.

The only place where marriages under this Act may be solemnized is the British Consulate, that is, the public office of the Consul-General, Consul, Vice-Consul, or Consular Agent, as the case may be; and every such marriage must be solemnized with open doors, between the hours of eight and twelve in the forenoon, in the presence of two or more witnesses. No marriages performed at other places or under other circumstances will be valid under this Act, and marriages cannot be solemnized under this Act in any churches or chapels, even though attached to British Missions, or connected with British Consulates abroad, nor can they be solemnized under this Act by an ambassador, minister, or other diplomatic agent of the Crown. All marriages duly solemnized, according to the



of the United States, that an American consul in a Christian country has no power to celebrate marriages between either foreigners or Americans. As will be shown hereafter, a different rule applies to consuls in the East. In proceedings in admiralty, when the courts are adjudicating cases of prize, or other questions of maritime and international right, consuls are permitted to appear in behalf of the interests of their countrymen; so, also, in cases of the administration of estates of their countrymen, or in which their countrymen are interested; but in all such cases they intervene by way of advice, or in the sense of *surveillance*, but not by way of jurisdiction.<sup>1</sup>

§ 15. Consuls are usually allowed to grant passports to subjects of their own country living within the range of their consulates, but not to foreigners. They, however, are usually required to put their *visé* upon the passports of foreigners who embark from the place of their consulate, to go to their

local law in force, so as to be valid by that law in the country where they are solemnized, are valid in England, if such marriages might lawfully have been contracted and solemnized within the British dominions. Marriages of British subjects domiciled in foreign countries, which are solemnized according to the *Lex loci*, are not affected by this Act or by the 4 Geo. IV., c. 91. But it being the law of Great Britain and Ireland that marriage with a deceased wife's sister is void, such a marriage would derive no validity from the circumstance of its being solemnized in a foreign country under either of the Acts although the law of such country may not prohibit such marriages. A marriage which would not be valid if solemnized in England is equally invalid if solemnized at a British Mission or Consulate, notwithstanding the *lex loci* prevailing generally with regard to marriage, in the country where the Minister or Consul resides.

Particular attention should be given to registration, in order that due record may be kept at the office of the British Registrar-General, of all marriages performed under this Act.

The Act does not provide for the registration of births and deaths of British subjects in foreign countries, but it is nevertheless very important that such registers should be kept at each Consulate, and should be transmitted to the Registrar-General.—*Brit. F.O. Inst.*, 1868.

Marriages celebrated in the presence of any Consular Officer of the United States in a foreign country, between persons who would be authorized to marry if residing in the district of Columbia, are valid to all intents and purposes as if the said marriage had been solemnized in the United States.—*U.S. Cons. Reg.*, 1870, R. 275. This Act does not authorise the Consul to perform the ceremony. The Consul is forbidden to perform such ceremony, unless he performs it within the precincts of a legation of the United States, or of a Consulate which has by treaty or custom the privilege of extraterritoriality; or unless he is expressly authorised to do so by the laws of the country in which he resides.—*Ibid.* R. 278.

<sup>1</sup> De Clercq, *Guide des Consulats*, p. 686; Miltitz, *Des Consulats*, pt. ii. pp. 408, 414, 425; Santos, *Traité du Consulat*, tome i. p. 21; tome ii. p. 52; Cushing, *Opinions U. S. Attys Genl.*, vol. vii. p. 18; vol. viii. p. 98; Kent v. Burgess, 11 *Simons R.*, 361.

(the consuls') country. But this, again, is a matter of local law of their own State. Passports, to be valid, should be given by the proper minister of the country of the person using them, or, at least, by the minister of that country at the court of the State in which they are to be used; usage has, nevertheless, extended the same effect to passports issued by consuls, within their consular jurisdiction.<sup>1</sup>

§ 16. Consuls are frequently required to give certificates relating to matters of fact connected with the commerce of their fellow-countrymen, and of merchant vessels of their own State. Such certificates, under seal, receive full faith and credit in the courts of the country where such fact is collaterally called in question. The laws of most States make it the duty of their consuls to take acknowledgment of deeds for the conveyance of real estate, the depositions of witnesses in civil causes, &c.; but the legal effect to be given to such acts must, in general, be determined by municipal law.<sup>2</sup>

§ 17. Although within the general duties and rights of consuls to watch over the interests of their own countrymen, it must be remembered that they can afford no protection against due process of the laws of the country where they

<sup>1</sup> Martens, *Guide Diplomatique*, § 78; Fynn, *British Consul's Handbook*, pp. 36, 55; Mensch, *Guide du Consulat*, pt. i. ch. ix. British Consular Officers will rarely be called upon by British subjects for passports; inasmuch as if local regulation should require foreigners on entering the local territory to be provided with passports, those documents should antecedently be procured by travellers; but if at any time British subjects should prove to a Consular Officer that a passport or other document from him is requisite to enable them to travel in or to pass out of the locality, he may consider himself authorised to grant such document or passport.

Whenever local regulations require that foreigners passing through a place, where a Consular Officer of their nationality is stationed, should have their passports *visé* by such Officer he may affix such *visa*; but before doing so he should satisfy himself, so far as possible, that there is no objection to such proceeding, and that the applicant is really a British subject; for in no case is a British Consular Officer allowed to *viser* the passport of a person not a British subject, or not holding British employment. This remark equally applies to the grant of a passport.—*Brit. F.O. Inst.*, 1868.

<sup>2</sup> Heffter, *Droit International*, § 247. British Consular Officers are instructed to be careful not to grant a certificate of any fact of which they have not accurately ascertained the truth. It is their duty to take especial care that they are not entrapped into affording assistance to the commission of fraud upon Her Majesty's revenue, or into giving the weight of their authority to slander, and thus do an injury to an innocent person by damaging his character.

But Consular Officers are not to decline to swear parties to affidavits, in proceedings pending in a British court of justice, by insisting on making themselves acquainted with the matter pending in such court.—*Brit. F.O. Inst.*, 1868.



reside, and any attempt to evade or resist their execution would constitute an offence for which the offending consul may be dismissed or punished. The only protection he can afford, even to his own countrymen, in such cases, is to see that the laws are properly administered; and if injustice is done to his fellow-countrymen by depriving them of the ordinary right of trial, or by distinguishing unfavourably between them and citizens of the State where he resides, and to which the tribunals belong, he should make representation to his own government, to whom it belongs to require explanation and satisfaction. He has no diplomatic authority to demand either the one or the other. Nevertheless, by a judicious but firm proceeding, and the exertion of his personal and official influence with the local authorities, he may do much toward securing the just rights of his countrymen, or in mitigating the severity of their punishment for offences committed.<sup>1</sup>

§ 18. Some States permit, and others forbid, their consuls to trade. As already stated, a consul engaged in trade is, in all that concerns that trade, subject to the local laws, and to the local jurisdiction, in the same way as a native merchant. Their consular character gives them no privileges in trade, either in peace or war. 'The character of consul,' says Lord Stowell, 'does not protect that of a merchant, united in the same person.' It is certainly a very objectionable practice to permit consuls to engage in trade, and has so been regarded by the best writers on international law. It necessarily brings them in competition, and not unfrequently in conflict, with the merchants of the place where they reside, and consequently weakens or destroys their official influence.<sup>2</sup>

<sup>1</sup> Phillimore, *On Int. Law*, vol. ii. § 258; Horne, *On Diplomacy*, sec. i. § 13; Bello, *Derecho Internacional*, pt. i. cap. vii. § 2; Moreuil, *Manuel des Agents Con.*, pt. iii. tit. ii.; Riquelme, *Derecho Pub. Int.*, lib. ii. cap. Ad. 3. Naturalised British subjects who can prove to Consular Officers that they are entitled to British Consular protection abroad are to be treated in every respect as British-born subjects; but certificates, if granted subsequently to the year 1850, do not entitle the holders to any privileges out of Her Majesty's dominions, unless they are provided with a passport from the British Secretary of State for Foreign Affairs, or from the Governor of any British colony in which they may have been naturalised, giving them for the term therein specified power to travel abroad.

Naturalised British subjects cannot claim in the country of their birth any privileges as such, unless by the laws of the country of their birth they have been denationalised.

<sup>2</sup> It was decided in a Circuit Court of the United States that where a

§ 19. The public character of consul has frequently been the subject of judicial decision in the prize courts and municipal tribunals of France, Great Britain, and the United States. The cases of the Marquis de la Fuente Hermosa, decided by the Cour Royale de Paris, in 1842, and that of M. Soller, decided by the Cour Royale d'Aix, in 1843, are leading cases in France; those of Barbuit and Cretico, in England. The courts of the United States have generally followed the English decisions on this subject.<sup>1</sup>

§ 20. Rights, privileges, and immunities are sometimes conceded to consuls by treaty stipulations, which they are not entitled to by the general law of nations. Thus, by the convention between France and the United States, in 1853, certain rights of jurisdiction and exemption, not accorded by international law, are given to the consuls of the contracting powers. But such treaty stipulations are binding only upon those who are parties to the agreement. The same may be said of municipal laws, which give special privileges to foreign

foreign Consul is carrying on trade as a merchant in the enemy's country, his Consular residence and character will not protect that trade from interruption by the seizure and condemnation of his property as enemy's property; and notwithstanding his Consular character he is to be considered in all commercial transactions as on the same footing as any other resident merchant.—'The Pioneer,' Blatchf., *Pr. Cas.*, 666.

<sup>1</sup> Barbuit's Case, *Talbot's Cases in Equity*, p. 281; *Clarke v. Cretico*, 3 *Burr. R.*, 1481; *Viveash v. Becker*, 3 *M. and Sel. R.*, 297; the 'Indian Chief,' 3 *Rob.*, 26; *Arnold v. U. Ins. Co.*, 1 *John R.*, 363; *Griswald v. Waddington*, 16 *John R.*, 346. In the case of the 'Nina' (2 *L.R.P.C.* 38), the Privy Council was of opinion that the protest of a foreign Consul does not *ipso facto* operate as a bar to the prosecution of a suit for wages. A foreign Consul has not power to put a veto on the exercise of the jurisdiction by the Court of Admiralty. The 'Golubchick' (1 *W. Rob.* 148) decides that the jurisdiction of the court of Admiralty cannot depend upon the will of a foreign Consul; that as he cannot confer the jurisdiction so he cannot take it away. If the Consul protests, but advances no reason, the suit will proceed. If he advances reasons for staying the suit, the plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the Consul; and then the Judge of the Court of Admiralty is to exercise his discretion and determine whether, having regard to those reasons with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By discretion is meant, according to *White v. Damon* (1 *Ves.* 35), not an arbitrary capricious discretion, but one that is regulated upon grounds that will make it judicial. That the exercise of this jurisdiction by the Court of Admiralty lies in the discretion of the court in the sense before stated, is established by a long line of authorities, from the time of Lord Stowell down to the present. They are all one way and conclusive on this subject. Their Lordships followed the decision in the case of the 'Octavie' (*Brown and Lush*, 215), and held that this discretion is not taken away by the 10th section of the Admiralty Jurisdiction Act.



consuls; they have no effect beyond the limits of the State which passes them, unless specially adopted or permitted by others.

§ 21. As already remarked, the powers, privileges and immunities of European and American consuls, in Mohammedan and unchristian dominions, are very different from those of consuls in Christian countries. This has resulted, in part, from their having there retained the general diplomatic character and prerogatives of jurisdiction, which, in earlier times, they possessed everywhere, and, in part, from the stipulation of treaties. Thus, the Sultans of Turkey have conceded to the consuls of Christian powers authority to exercise jurisdiction over their fellow-countrymen in Turkey, which, by the general rule of international law of Christian States, belongs to the territorial sovereign. Such jurisdiction, both civil and criminal, being conceded to the consuls over their countrymen, to the exclusion of the local magistrates and tribunals, it depends upon the laws of their own States how it shall be exercised, and what penalties or punishments may be imposed or inflicted. In civil cases this jurisdiction is ordinarily subject to an appeal to the superior tribunals of their own country, and in criminal cases the prisoners are sometimes sent home for trial and punishment, especially if the punishment exceeds the infliction of pecuniary penalties. This, however, depends upon the laws of their own country regulating such proceedings.<sup>1</sup>

§ 22. Mr. Cushing, the United States Attorney-General, thus describes the origin of this difference of consular powers in Christian and unchristian countries: 'I might demonstrate historically what, in this place, it will suffice to affirm, that the institution of consuls, in their present capacity of international agents, originated in the mere fact of difference in law and religion at that period of modern Europe in which it was customary for distinct nationalities, coexisting under the same general political head, and even in the same city, to maintain each a distinct municipal government. Such municipal colonies, organised by Latin Christians, and especially by those of the Italian Republics in the Levant, were administered each by its *consuls*, that is, its proper municipal

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 11; Phillimore, *On Int. Law*, vol. ii. §§ 272 et seq.; Dalloz, *Répertoire*, verb. 'Consuls,' § 1.

magistrates of the well-known municipal denomination. Their commercial relation to the business of their countrymen was a mere incident of their general municipal authority. Such, also, at the outset, was the nature of their political relation to other coexisting nationalities around them in the same country, and to that country's own supreme political or military powers. The consuls of Christian States, in the countries not Christian, still retain unimpaired, and habitually exercise, their primitive function of municipal magistrates for their countrymen, their commercial or international capacity, in those countries, being but a part of their general capacity as the delegated administrative and judicial agents of their nation. This condition of things came to be permanent in the Levant, that is, in Greek Europe and its dependencies, by reason of the tide of Arabic and Tartar conquest having overwhelmed so large a part of the Eastern empire, and established the Mohammedan religion there. But the result was different in Latin Europe. This difference, in the powers of consuls in Christian and in Mohammedan countries, he says, is founded on the difference of law which necessarily results from the character of the different religions. 'The legislature of Mohammed, for instance, like that of Moses, is inseparable from his religion. We cannot submit to one without undergoing the other. The same legal incompatibility exists, for one reason or another, between us and the unchristian States not Mohammedan.'<sup>1</sup>

§ 23. The general powers of the consuls of Christian nations in Turkey, the Barbary States, and other Mohammedan countries, have been extended, by treaty stipulations, to European and American consuls in the Chinese empire. It was the object of these treaties to exempt foreigners, in China, from the civil and criminal jurisdiction of the local magistrates and tribunals, and make them subject only to the laws and authorities of their own country, thus creating a kind of ex-territoriality for all citizens of the contracting States resident in or visiting any part of the Chinese empire.<sup>2</sup>

§ 24. The thirteenth article of the commercial treaty between Great Britain and China, in 1843, is as follows: 'Article

<sup>1</sup> Cushing, *Opinions U. S. Att'ys Genl.*, vol. vii. pp. 346-348.

<sup>2</sup> Treaty between Great Britain and China, 1842, 1843; Treaty between U. S. and China, July 3, 1844; Treaty between France and China, Oct. 24, 1844.



thirteen. Whenever a British subject has reason to complain of a Chinese, he must first proceed to the consulate and state his grievance. The consul will thereupon enquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If an English merchant have occasion to address the Chinese authorities, he shall send the address through the consul, who will see that the language is becoming; and, if otherwise, will direct it to be changed, or will refuse to convey the address. If, unfortunately, any disputes take place of such a nature that the consul cannot arrange them amicably, then he shall request the assistance of a Chinese officer, that they may, together, examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English government will enact the laws necessary to attain that end, and the consul will be empowered to put them in force; and, regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nankin after the conclusion of peace.'

§ 25. With respect to the jurisdiction and judicial powers exercised by British consuls, and other officers, in the East, and in China, the English statute, for carrying this article into effect, is very general in its terms, the details being supplied by Orders in Council, and instructions from the Foreign Office. The statute of August, 1843 (*6 and 7 Vict.*, c. 94) enacts: 'That it is, and shall be lawful, for Her Majesty to hold, exercise, and enjoy any power or jurisdiction which Her Majesty now hath, or may at any time hereafter have, within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory. That every act, matter, and thing which may at any time be done in pursuance of any such power or jurisdiction of Her Majesty, in any country or place out of Her Majesty's dominions, shall, in all courts, ecclesiastical and temporal, and elsewhere within Her Majesty's dominions, be, and be deemed and adjudged to be, in all cases, and to all intents and purposes whatsoever, as valid and effectual as though the same

had been done according to the local law then in force within such country or place.<sup>1</sup>

§ 26. In consequence of the provisions of this statute, two important Orders in Council were issued, respecting the civil and criminal jurisdiction of Her Majesty's consuls in the Levant, and the Foreign Office put forth a memorandum, for the guidance of the consuls in the exercise of such jurisdiction, and clearly stating the grounds upon which it rests. It says that, as this right of jurisdiction is an exception to the system universally observed among Christian nations, and is derived solely from concessions made by the territorial sovereignty, it 'is strictly limited to the terms in which the concession is made;' that, in the next place, it depends 'on the extent to which the Queen, in the exercise of the power vested in Her Majesty by act of parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects, and, therefore, the orders in council, which may, from time to time, be issued, are the only warrants for the proceedings of the consuls, and exhibit the rules to which they must scrupulously adhere.'

§ 27. The articles of the treaty entered into, in 1844, between France and China, relating to this subject, are as follows: 'XXV. Lorsqu'un citoyen Français aura quelque sujet de plainte ou quelque réclamation à formuler contre un Chinois, il devra d'abord exposer ses griefs au consul, qui, après avoir examiné l'affaire, s'efforcera de l'arranger amiablement. De même, quand un Chinois aura à se plaindre d'un Français, le consul écoutera sa réclamation avec intérêt, et cherchera à ménager un arrangement amiable. Mais si, dans l'un ou l'autre cas, la chose était impossible, le consul requerra l'assistance du fonctionnaire Chinois compétent, et tous deux, après avoir examiné conjointement l'affaire, statueront suivant l'équité. XXVI. Si dorénavant des citoyens Français, dans un des cinq ports, éprouvaient quelque dommage, ou s'ils étaient l'objet de quelque insulte ou vexation de la part de sujets Chinois, ceux-ci seront poursuivis par l'autorité locale, qui prendra les mesures nécessaires pour la défense et la protection des Français. A bien plus forte raison, si des malfaiteurs, ou quelque partie égarée de la popu-

<sup>1</sup> See, *Hervey v. Fitzpatrick*, *Kay R.*, 421, on the construction of this statute.



lation, tentaient de piller, de détruire ou d'incendier les maisons, les magasins des Français, ou tout autre établissement formé par eux, la même autorité, soit à la réquisition du Consul, soit de son propre mouvement, enverrait en toute hâte la force armée pour dissiper l'émeute, s'emparer des coupables et les livrer à toute la sévérité des lois ; le tout sans préjudice des poursuites à exercer par qui de droit pour indemnisation des pertes éprouvées. XXVII. Si malheureusement il s'élevait quelque rixe ou quelque querelle entre des Français et des Chinois, comme aussi dans le cas où, durant le cours d'une semblable querelle, un ou plusieurs individus seraient tués ou blessés, soit par des coups de fer, soit autrement, les Chinois seront arrêtés par l'autorité Chinoise qui se chargera de les faire examiner et punir, s'il y a lieu, conformément aux lois du pays. Quant aux Français, ils seront arrêtés à la diligence du consul, et celui-ci prendra toutes les mesures nécessaires pour que les prévenus soient livrés à l'action régulière des lois Françaises, dans la forme et suivant les dispositions qui seront ultérieurement déterminées par le gouvernement Français. Il en sera de même en toute circonstance analogue et non prévue dans la présente convention, le principe étant que, pour la répression des crimes et délits commis par eux dans les cinq ports, les Français seront constamment régis par la loi Française. XXVIII. Les Français qui se trouveront dans les cinq ports dépendent également pour toutes les difficultés ou les contestations qui pourraient s'élever entre eux, de la juridiction Française. En cas de différends survenus entre Français et étrangers, il est bien stipulé que l'autorité Chinoise n'aura à s'en mêler d'aucune manière. Elle n'aura pareillement à exercer aucune action sur les navires marchands Français ; ceux-ci ne relèveront que de l'autorité Française et du capitaine.'

§ 28. De Clercq, writing in 1851, says that no special laws or regulations had yet been made for carrying into effect the treaty of 1844, and that the jurisdiction of the French agents in China, having no other legal basis than the *ordonnance* of 1681, was, consequently, bound to conform to the dispositions of that *ordonnance*. But, on July 8, 1852, a law was passed for the purpose of regulating the jurisdiction of French consuls in China, conformably to the dispositions of the treaty of 1844. With respect to civil jurisdiction, that law re-enacts,

with some exceptions, the provisions of the edict of June, 1778, relating to the Levant and Barbary; and, with respect to criminal jurisdiction, it conforms generally to the law of May 28, 1836, relating to the same countries. Appeals, in certain specified cases, are allowed from the French consular tribunals in China to the French court of appeals in Pondichery. By recurring to the ordonnance and law above referred to, it will be seen that the jurisdiction and proceedings of the French consular courts in the East are regulated with great minuteness of detail.<sup>1</sup>

<sup>1</sup> De Clercq, *Guide des Consuls*, pp. 150-153; De Clercq, *Formulaire des Chancelleries*, tome ii. pp. 369-374; *Ordonnance d'août*, 1681, liv. i. tit. ix. arts. 13-15; Moreuil, *Manuel des Agents Cons.*, pp. 379 et seq.

With regard to Great Britain, by the authority of the 6 and 7 Vict. c. 94, and in execution of Orders in Council of January 6, 1862, March 21, 1862, and November 30, 1864, all rules, orders, and regulations concerning the navigation of the river Danube, or the government of persons navigating the same, or tolls levied in respect of such navigation, or penalties for the breach of the said rules, orders and regulations, which were promulgated by the Commission established under the 15 and 16 Articles of the Treaty of Paris, 1856, are binding upon all British subjects and other persons subject to the jurisdiction of the British Consular Agents in the dominions of the Sublime Ottoman Porte.

By the authority of the 6 and 7 Vict. c. 94 (the Foreign Jurisdiction Act), and of an Order in Council of November 30, 1864, 'Her Britannic Majesty's Supreme Consular Court, for the Dominions of the Sublime Ottoman Porte,' was established in Turkey; all British jurisdiction exercisable in the Ottoman dominions for the judicial hearing and determination of matters in difference between British subjects and foreigners, including Turkish subjects, or for the administration or control of the property or persons of British subjects, or for the punishment of offences committed by British subjects, or for the maintenance of order among British subjects, is to be exercised according to the said Order in Council, and not otherwise (6).

The more important regulations are as follows:—Nothing in the order deprives any person of the benefit of any reasonable custom obtaining within the Ottoman dominions, except where the Order contains some express provision incompatible with such custom (8).

With the exception of offences against treaties, no act done by a British subject in the Ottoman dominions, or on board a British vessel within those dominions, which would not in England be deemed an offence, shall, in the exercise of criminal jurisdiction under the Order, be deemed an offence (9).

The Superior Consular Court holds its ordinary sittings at Constantinople; but it may on emergency sit at any other place within the district of the Consulate-General of Constantinople, and may hold its ordinary sittings at any such place within the Ottoman dominions as one of Her Majesty's principal Secretaries of State approves (11).

In addition to this Court, each of Her Majesty's Consuls-General, Consuls and Vice-Consuls (holding a commission as such from Her Majesty), resident in the Ottoman dominions (with some exceptions), for and in his own consular district, holds a Provincial Consular Court (15).

Every Consular Court is a Court of Record (31).

The order of the Supreme Consular Court is sufficient authority to



§ 29. By the treaty of July 3, 1844, between the United States of America and China, it was stipulated as follows: 'Article twenty-first. Subjects of China, who may be guilty of any criminal act towards citizens of the United States,

the commander of a British vessel of war, or of any other vessel, to receive and detain any person named in any writ or order of the Supreme Court, and to carry him to Constantinople according to the order (32).

The Supreme and every other Consular Court is a court of Law and of Equity (39), and a court of Bankruptcy (40).

The Supreme Consular Court is a Court of Vice-Admiralty, and every Provincial Consular Court held before a resident Legal Vice-Consul is a Court of Vice-Admiralty (41).

The Supreme Consular Court, as far as circumstances admit, has in itself exclusively, for and within the dominions of the Sublime Ottoman Porte, with respect to British subjects, all jurisdiction relative to the custody and management of the persons, and estates of persons, of unsound mind (42). The Supreme Consular Court is a Court for Matrimonial Causes (43), and a Court of Probate (44).

Every Consular Court may deal with any British subject being within the district of the court and charged with any offence within the Ottoman dominions, or on board a British vessel within those dominions, or, where the offence is to be tried in England, may commit him for trial and cause him to be taken to England (49).

Where any person is charged with any offence the cognizance whereof appertains to a Consular Court in the Ottoman dominions, the accused may (under the Foreign Jurisdiction Act, section 4) be sent for trial as follows:—If a native Indian subject of Her Majesty, to Bombay, and as to other British subjects, to Malta (52).

Every British subject (except native Indian subjects of Her Majesty) resident in the Ottoman dominions, being of the age of twenty-one years or upwards, or being married, or a widower, or widow, though under that age, shall, in the month of January in every year, register himself or herself at the consulate of the district in which he or she resides. The registration of a man is deemed to comprise his wife (unless she is living apart from him); and the registration of the head of a family, whether male or female, comprises all females being relatives of the head of the family (in whatever degree of relationship), living under the same roof (72).

If any British subject publicly insults any religion observed within the Ottoman dominions, or any religious service, tomb, or sanctuary, he is liable to fine and imprisonment (77).

Though the Ottoman Porte could give and has given to the Christian powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give, nor could give, to one such power any jurisdiction over the subjects of another power. But it has left these powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own sovereign, and that of the sovereign to whose tribunals they resort. There is no compulsory power in an English court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his sovereign, and thereby submit himself to its jurisdiction.—'The *Laconia*,' 2 *Moore, P. C. (N. S.)*, 183; see also 'The *Indian Chief*,' 3 *Rob.* 28.

There is a similar British jurisdiction over British subjects in Zanzibar, Madagascar, and Muscat. For Egypt, see Appendix, vol. ii.

shall be arrested and punished by the Chinese authorities, according to the laws of China. And citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul or other public functionary of the United States, thereto authorised, according to the laws of the United States. And, in order to the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides.' 'Article twenty-fourth. If citizens of the United States have special occasion to address any communication to the Chinese local officers of government, they shall submit the same to their consul or other officer, to determine if the language be proper and respectful, and the matter just and right, in which event he shall transmit the same to the appropriate authorities, for their consideration and action in the premises. In like manner, if subjects of China have special occasion to address the consul of the United States, they shall submit the communication to the local authorities of their own government, to determine if the language be respectful and proper, and the matter just and right, in which case the said authorities will transmit the same to the consul, or other officer, for his consideration and action in the premises. And if controversies arise between citizens of the United States and subjects of China, which cannot be amicably settled otherwise, the same shall be examined and decided conformably to justice and equity, by the public officers of the two nations acting in conjunction.' 'Article twenty-fifth. All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government. And all controversies occurring in China, between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.'

§ 30. Mr. Cushing, the American commissioner who negotiated this treaty with China, in his letter to the American secretary of State, dated September 29, 1844, says that he entered China with the general conviction that the United States ought not to concede to any Mohammedan or pagan State, under any circumstances, the local jurisdiction over



a citizen of the United States, which was claimed and exercised by foreign *Christian* States. 'In our treaties with the Barbary States, with Turkey, and with Muscat, I had the precedent of the assertion, on our part, of more or less of exclusion of the local jurisdiction, in conformity with the usage, as it is expressed in one of them, observed in regard to the subjects of other Christian States. In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire, while the Portuguese attained the same object through their own local jurisdiction at Macao. I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of the citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang Hiya. And it was fully admitted by the Chinese, in the correspondence with occurred contemporaneously with the negotiation of the treaty, on occasion of the death of Sha Aman. \* \* \* By that treaty, thus construed, the laws of the United States follow its citizens, and its banner protects them, even within the domain of the Chinese empire. The treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries; and the treaty with Turkey places the same authority in the hands of our minister or consul, as the substitute for the local jurisdiction, which, in the case of a controversy, would control it, if it arose in Europe or America. These treaties are, in this respect, accordant with general usage, and what I conceive to be the principles of the law of nations in relation to the non-christian powers. In extending these principles to our intercourse with China, seeing that I have obtained the concession of absolute and qualified ex-territoriality, I consider it well to use in the treaty terms of such generality, in describing the substitute jurisdiction, as while they held unimpaired the customary or law of nations jurisdiction, do also leave to congress the full and complete direction to define, if it please to do so, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States.' Mr. Cushing, in commenting upon this treaty, shows that it confers on citizens of the United States, in China, absolute and unqualified ex-territoriality in all *criminal* matters,

and provides, with respect to *civil* matters: 1st. That questions arising *between citizens of the United States*, in China, shall be subject to the jurisdiction, and be regulated by the *authorities* of their own government; 2nd. That, in controversies between a citizen of the United States and a Chinese, the authorities of the two governments are to have concerted action; 3rd. That, in controversies between a citizen of the United States and any other person, not a Chinese, the adjustment is to be regulated by the international relations of the United States and the government or State of that other person.<sup>1</sup>

§ 31. 'In order to carry into effect the provisions of the treaty, and to extend our jurisdiction over our people in China, it was necessary to provide for persons clothed with lawful authority for that purpose; and these are described in the treaty as "consuls or other officers, public officers, the consuls or other public functionary, and the authorities" of the United States.' But, continues Mr. Cushing, 'in thus retaining jurisdiction of our citizens in China, and providing persons to exercise it, we could not rely upon the law of nations exclusively, nor upon usages, or a customary local code applicable to the emergency, such as exist in the Levant.' Accordingly, the statute of August 11, 1848, provides the following system of laws for the exercise and enforcement of such jurisdiction: 1st. The laws of the United States, 'so far as such laws are suitable to carry said treaty into effect; ' 2nd. 'The common law,' in all cases where the laws of the United States 'are not adapted to the subject, or are deficient in the provisions necessary to furnish suitable remedies; ' 3rd. 'Decrees and regulations,' by the commissioner, 'which shall have the force of law,' and supply such defects and deficiencies 'as still remain to be supplied,' and the regulations, orders and decrees 'made by the commissioner, with advice of the several consuls, must be transmitted to the President, to be laid before congress for its revision,' but they are to be 'binding and obligatory until annulled or modified by congress.' The first, second and third sections of the statute give to the commissioner and consuls the judicial authority necessary to execute the provisions of the treaty, without, however, distributing it between them. It describes the manner in which

<sup>1</sup> Cushing, *Opinions U. S. Att'ys Genl.*, vol. vii. pp. 498, 501.



they are to administer law in China, in criminal cases, and, also, in *certain* civil cases, but 'is absolutely silent,' says Mr. Cushing, with respect to a large class of cases where no question of mere damage is involved, such as many suits *in rem*, and many others *de re*; cases of property where only equitable relief is asked; 'cases of co-partnership, or joint interest in real or personal estate; of *insolvency*, of divorce, of alimony, of wills, and of intestate succession.' And as the statute is absolutely silent as to these matters, the distribution of them 'is to be made by regulation, in subordination always to other specific rules of law.' Again, he says: 'The commissioner and the consuls shall make provision, in the manner indicated by the statute, that is, by separate or joint regulations (secs. four and five), concerning all those things, the jurisdiction of which it leaves indeterminate, and, therefore, subject to "regulation."'" Matters of insolvency, intestacy, probate of will, divorce, division or regulation of co-partnership, or other common interests, *habeas corpus*, specific performance, trust, discovery, seamen's wages, charter party, bottomry, and other matters of equity, admiralty, or ecclesiastical law, are, for the most part, of local nature, and requiring prompt interlocutory action of judicial authority, and, therefore, seem to be fit subjects for the original jurisdiction of the consuls, with proper regulations for appeal to the commissioner. 'On the other hand, some processes, like mandamus, prohibition, supersedeas, are of so high a nature that, like review, they seem appropriate to the jurisdiction of the commissioner. The same observation may apply to some processes in equity. Even, as to all these matters which the statute leaves undetermined, the safer course appears to me to be to adhere, so far as may be, to the spirit of the law, which makes the commissioner the appellate supervisor of the judicial acts of the consuls.' It will be perceived, by referring to the act, that its provisions respecting criminal jurisdiction and proceedings are more definite and minute, specifying in what cases appeals may be taken to the commissioner, the amount of fines which may be imposed, and the nature and extent of punishments which may be inflicted, the means for enforcing judgments and sentences, etc.<sup>1</sup>

<sup>1</sup> Gardner, *Institutes*, p. 503; Cushing, *Opinions U. S. Att'ys Gen.* vol. vii. pp. 510, 511; Forbes v. Scannel, 13 Cal. R. 242.

§ 32. On the second day of October, 1854, the U. S. commissioner to China, with the advice of the U. S. consuls, issued a decree distributing the judicial authority conferred upon the commissioner and consuls, by the statute of August 11, 1848, to execute the provisions of the treaty in certain cases which had not been provided for in the statute, otherwise than by conferring the authority in general terms. This decree provides detailed 'rules and regulations' for the law and equity jurisdiction of the United States' consular courts in China, the issuing of writs and processes, etc. It says: 'The United States' consular court may exercise equity jurisdiction where the subject matter complained be a matter of, first, accident and mistake; second, account; third, fraud; fourth, infants; fifth, specific performance of agreements; sixth, trusts. \* \* \* As to trusts, equity will superintend and protect the creation of trusts, whether vesting in the trustee real or personal estate, and take jurisdiction of trusts, whether resulting from an express deed, or the force of circumstances and the situation of parties, which latter are implied trusts.' The decree provides, in detail, for new trials and appeals from the consular courts in all proceedings at law, and adds: 'New trials and appeals shall lie from the equity jurisdiction of the United States' consular court as from the common law jurisdiction of the same.' It is thus seen, that the treaty, the act of August 11, 1848, and the commissioner's decree of Oct. 2, 1854, furnish a complete system of law and jurisprudence, and courts of competent jurisdiction, for the punishment of crimes and offences committed by American citizens in China, and for the determination of all disputes between such citizens. It remains to be considered whether the system embraces questions of dispute between such citizens and other foreigners resident there.<sup>1</sup>

§ 33. It will be observed that, according to the provisions of the foregoing treaties, where controversies arise, in China, between citizens of the United States and subjects of Great Britain or France, the Chinese laws do not apply, nor can the Chinese tribunals give any relief. The jurisdiction of such controversies is left to be determined by treaties between the respective governments. But as no such special treaties have ever been made, and, perhaps, never will be made, are there no

<sup>1</sup> The *China Mail*, May 15, 1856.



means left for the determination of such controversies? Is the system of law and jurisdiction established by the treaty, and by the act of 1848, so imperfect and defective, that Asiatic, European, and non-resident Americans in China have no means of determining their controversies with Americans resident there; and can American residents have no judicial relief against other resident or domiciled foreigners? There is no plainer or better established principle of public law than this, that alien friends may sue in the courts of the *defendant's* country. Now, in China, as in other unchristian countries, American citizens and American consular courts enjoy the rights of ex-territoriality, and the same may be said of British and French citizens, and British and French consular courts. Each one is, in the eye of the law, to be considered within the territory of its own State. It follows, therefore, that an American in China may resort to the British courts there against an Englishman, or to the French courts there against a Frenchman, precisely as he might in England or France, and that an Englishman or a Frenchman may resort to American courts in China against an American, precisely as he might in the United States. The maxim of the Roman law, *actor sequitur forum rei*, is an admitted principle of the jurisprudence of all civilized nations.<sup>1</sup>

§ 34. The United States' Attorney-General, Mr. Cushing, in his official opinion, has fully discussed this question with respect to the jurisdiction of the United States' courts in China. In a civil controversy, arising under a demand by a Chinese against an American, he says: 'The Chinese will go into the United States consular court as plaintiff, and that court will take jurisdiction of the defendant as an American; and where the demand is by an American against a Chinese, the former must, of necessity, be content with such judicial or executive action of the Chinese government in the premises as appertains to their institutions, and as, by application, may be required on the part of the United States.' 'As to the other case,' he continues, 'that of controversies occurring in China

<sup>1</sup> Foelix, *Droit Int. Privé*, tit. xi. ch. ii.; De Clercq, *Guide des Consuls*, pp. 697-702; Riquelme, *Derecho Pub. Int.*, lib. ii. tit. i. cap. v.

See also, between China and Great Britain, the treaty of 1858, concerning Free Trade, and the convention of Peking, 1860; between China and Prussia, the treaty of 1863; between China and Russia, the treaty of 1860; and between China and the United States, the treaty of 1859.

between citizens of the United States and subjects of any other (Christian) government, the treaty provides that the same "shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China." (Art. twenty-five.) Now, we have no *special* treaty with any of these governments on this point, nor is any needed, or necessarily required or intended by the stipulation under consideration. With all, we have treaties of amity, or of ordinary commercial and social intercourse, and that suffices to meet the exigency. But, by the tenor of those treaties, as they are construed by the law and usage of nations, an Englishman has the right to sue a resident American, or an American a resident Englishman, as alien friend, in all places wherever, respectively, the jurisdiction of the other country exists locally, and is complete as to subject matter, persons, and remedial forms. The jurisdiction of the United States is complete as to their citizens in China, and the jurisdiction of Great Britain is complete as to her subjects in China. That the jurisdiction, in each case, is ex-territorial; that in China it is excepted from the local territoriality, and that it is outside of the territoriality of either Great Britain or the United States, is a fact wholly immaterial to the question. It is a question free of all doubt on principles of international right, and subject only to the single inquiry, whether the given country, each proceeding in established legal forms, by whatsoever authority such forms be established, has conferred on its courts of justice in China jurisdiction *ad hoc*, or whether that remains to be done. Here, again, the statute is explicit and ample. It confers on the consular courts jurisdiction of "all civil cases arising under said treaty." A demand of an Englishman against an American is a civil case arising under the treaty, as we see. Therefore, a suit may be brought by the Englishman against the American in the consular court of the United States; as, undoubtedly, in the consular court of Great Britain it may, consistently with public law, be brought by an American against an Englishman. If the Englishman were within the territorial jurisdiction of the United States he might sue, but would also be subject to suit in the local courts, as the American might and would be in England. Nay, a suit would lie in the courts of Great Britain or the United States, between residents, both being aliens in the country. In China,



the relative condition of all these persons differs in this, that the local courts of each government, being ex-territorial ones, have no territorial jurisdiction, but only a jurisdiction as respects persons, namely, its own citizens or subjects. Of course, neither government can take compulsory jurisdiction there of a subject or citizen of any other, but each may act compulsorily upon its own, at the suit of that of another. Perhaps neither government is under perfect obligation to do this, but it may do so in obedience to national comity; it can rightfully do so if it will; and its obligation to do so will be perfect, provided the exercise of the right be reciprocated by the other government.' These views were recognised and carried out in the 'rules and regulations' for the United States' consular trust in China, contained in the decree of Commissioner McLane, dated October 2, 1854. In rule second, it says: 'When a citizen of the United States, who is a resident in China, or any subject of the Emperor of China, *or the citizen or subject of any other State or nation*, who may have a right to bring suit against a citizen of the United States in the United States' consular court in China, has a claim arising on contract and already due, against any citizen of the United States residing in China, he may apply to the United States consular court where the debtor resides, to declare him insolvent, and close his affairs,' etc.<sup>1</sup>

<sup>1</sup> Cushing, *Opinions U. S. Attys Genl.*, vol. vii. pp. 517-519.

Japan formerly traded only with China and Holland, but in 1854 she entered into a commercial treaty with Great Britain. In the same year a treaty was entered into between Japan and the United States, by which it was stipulated that the United States should appoint consuls or agents to reside in Simoda, at any time after the expiration of the eighteen months from the date of the signing of the treaty, if either of the two Governments deemed such arrangement necessary. By a subsequent treaty in 1857, between the two countries, it was provided that Americans committing offences in Japan should be tried by the American Consul-General or Consul, and should be punished according to American laws. Japanese committing offences against Americans were to be tried by the Japanese authorities, and punished according to Japanese laws.

By a subsequent treaty in 1858, between the two countries, after again declaring the above, it was further agreed that the Consular Courts should be opened to Japanese creditors, to enable them to recover their just claims against American citizens, and that the Japanese courts should in like manner be open to American citizens for the recovery of their just claims against the Japanese.

By the treaty of Jeddo, 1858, Japan was opened to the commerce of Great Britain. Yedo, Osaka, and Hiogo were opened to European commerce in 1868.

Treaties between Japan and Great Britain, and between Japan and France, were ratified in 1865. In that year, by the authority of the 7 and

8 Vict. c. 80 and c. 94, and on account of the British Treaties with China and Japan, a British Order in Council was issued on March 9, establishing a Supreme Court of Justice at Shanghai, and Provincial Courts in China and in Japan, and directing that all British jurisdiction exercisable in China or in Japan for the judicial hearing and determination of matters in difference between British subjects, or between foreigners (including Chinese and Japanese) and British subjects, or for the administration or control of the property or persons of British subjects, or for the repression or punishment of offences committed by British subjects, or for the maintenance of order among British subjects, should thenceforth be exercised under and according to that Order, and not otherwise (4).

The principal rules are as follows :—The jurisdiction to be in conformity with the Common law, the rules of Equity, the Statute law, and other law in force in England, and the practice observed by Courts of Justices, and Justices of the Peace in England (5).

Every Consul-General, Consul and Vice-Consul in China or in Japan (with some few exceptions), to hold in his own consular district a Provincial Court (25).

The personal property of every British subject, having at the time of death his fixed place of abode in China or Japan, and dying intestate, is to vest in the Judge of the Supreme Court until administration, as in the Court of Probate (59).

Every court may cause to be apprehended and brought before it, any British subject, being within the district of the court, and charged with having committed an offence in China or in Japan, and may deal with the accused according to the Order, or where the offence is triable in British dominions, may take the preliminary examination and commit the accused for trial (64).

If a person charged with having committed a crime or offence in the district of one court, is found within the district of another court, the court within the district of which he is found, may proceed in the case in the same manner as if the offence had been committed in its own district ; or may, on the requisition of the court of the district in which the offence was committed, send him in custody to that court, or require him to give security for his surrender to that court (65).

Where a warrant or order of arrest is issued in British dominions for the apprehension of a British subject, and is produced to any court, that court may back the warrant or order ; and it shall be sufficient authority to any person to whom the warrant or order was originally directed, and also to any officer of the court by which it is backed, to apprehend the accused at any place where the court, by which the warrant or order is backed, has jurisdiction, and to carry him to, and deliver him up, in British dominions (66).

If any British subject commits any of the following offences, viz. :—

1st. In China, while Her Majesty is at peace with the Emperor of China, levies war or takes part in any operation of war against the Emperor of China, or aids or abets any person in carrying on war, insurrection or rebellion against the Emperor of China.

2nd. In Japan, while Her Majesty is at peace with the [Mikado] of Japan (see Order in Council, May 13, 1869), levies war or takes part in any operation of war against the [Mikado] of Japan, or aids or abets any person in carrying on war, insurrection or rebellion against the [Mikado] of Japan :—

He shall be guilty of a misdemeanour and liable to imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding 5,000 dollars, or by a fine not exceeding 5,000 dollars, without imprisonment : and in addition he shall be liable to deportation (81).



If any British subject, without British license, takes part in any operation of war in the service of the Emperor of China against any persons engaged in carrying on war, insurrection or rebellion against the Emperor of China, he shall be guilty of a misdemeanour (82).

If any British subject in China or in Japan violates or fails to observe any stipulation of any treaty between Great Britain and China or Japan, in respect of the violation whereof any penalty is stipulated for in the treaty, he shall be punished accordingly (84).

All British trade in, to, or from any part of Japan, except such ports and towns as are opened to British subjects by treaty, is unlawful (92).

The officer commanding any British vessel of war may seize any British vessel engaged, or reasonably suspected of being, or having been, engaged in any trade by this order declared unlawful, and may either detain the vessel with the master and crew, or may take it and them to some place in Japan convenient for prosecution, and such vessel, master and crew may be detained (at the place of seizure or to which taken) by such officer or a British Consular Officer in China or Japan until the conclusion of any proceedings (94).

If any British subject publicly insults any religion observed in China or in Japan,—or any religious service, tomb, or sanctuary, he shall be liable to fine and imprisonment (100).

Where a British subject in China or in Japan, commits any offence within a British vessel at a distance of not more than a hundred miles from the coast of China, or within a Chinese or Japanese vessel at such distance as aforesaid, or within a vessel not lawfully entitled to claim the protection of the flag of any State at such distance as aforesaid, any British courts in China or in Japan, within the jurisdiction whereof he is found, may commit him for trial (101).

Every British subject resident in China or Japan—being of the age of twenty-one years or upwards—or being married, or a widower or widow, though under that age, shall in the month of January in the year 1866 and every subsequent year register himself or herself at the Consulate of the district in which he or she resides. The registration of a man includes the registration of his wife (unless she is living apart from him), and the registration of the head of a family, male or female, includes all females being relatives of the head of the family (in whatever degree of relationship) and living under the same roof.

Every British subject, non-resident, arriving at any place in China or Japan where there is a Consular Office shall, unless on the muster roll of a British vessel, register himself or herself within a month.

Any person failing to register shall not be recognised as a British subject in China or Japan, and shall be liable to a fine (114).

By the treaty of 1856, between the United States and Persia, all suits arising in Persia between Persians and Americans are to be decided by a Persian tribunal in the presence of an *employé* of the Consul or agent of the United States; suits between Americans to be decided by their Consul or Agent, according to the laws of the United States; suits between Americans and the subjects of other foreign powers, to be adjudicated by the intermediation of their respective Consuls and Agents.

In the United States, Persian subjects, in all disputes arising between themselves, or between them and Americans or foreigners, are to be judged according to the rules adopted in the United States, respecting the subjects of the most favoured nation.

The treaty of March 4, 1857, between Great Britain and Persia, makes certain reservations in favour of British subjects, and the privileges of the most favoured nation are accorded to them.

## CHAPTER XII.

## DETERMINATION OF NATIONAL CHARACTER.

1. National character, how determined—2. Rights of allegiance and naturalisation—3. Municipal laws relating to these rights—4. Apparent conflict of these laws—5. National character changed by personal domicile—6. By a new commercial domicile—7. Domicil defined—8. Different kinds of domicile—9. Intention the controlling principle—10. Necessity of some overt act—11. Circumstances of residence—12. Effect of domestic ties, etc.—13. Investment of capital and exercise of political rights—14. Character and extent of business—15. Length of residence—16. Distinctions in favour of American merchants—17. Presumption arising from foreign residence—18. Evidence to repel this presumption—19. Ministers and Consuls—20. Other public officers—21. A wife, minor, student and servant—22. A soldier, prisoner, exile and fugitive—23. Effect of municipal laws on domicile—24. Of treaties and customary law—25. Temporary residence for collection of debts—26. A merchant may have several national characters—27. Native character easily reverts—28. Leaving and returning to native country—29. Belligerent subjects during war—30. Effect of military occupation—31. Of complete conquest—32. Of cession without occupation—33. Of revolution and insurrection—34. Of a particular trade—35. This differs from domicile—36. Habitual employment—37. National character of ships and goods.

§ 1. NATIONAL CHARACTER may be determined from origin, naturalisation, domicile, residence, trade, or other circumstances. That which results from birth or parentage, follows the individual wherever he may be, till it is changed in one of the modes established or recognised by law: such as expatriation, naturalisation, domiciliation, etc. Native allegiance is a legal incident of birth, and is the implied fidelity and obedience due from every person to the political sovereignty under which he is born. This is a principle of universal law, and is sanctioned alike by international jurisprudence and by the municipal codes of all countries. How far, and in what manner, this primitive allegiance may be dissolved or transferred, are questions which, perhaps, belong rather to municipal than to general public law, for the international *status* of the individual may be determined, at least in many cases, without regard to his allegiance, whether native or acquired. In others, how-



ever, this question must be considered in connection with the right of expatriation and naturalisation. It may be proper to remark in this place that, inasmuch as the national character, which results from origin, continues till legally changed, the *onus* of proving such change usually rests upon the party alleging it.<sup>1</sup>

§ 2. It has already been remarked, that every independent State has, as one of the incidents of its sovereignty, the right of municipal legislation and jurisdiction over all persons within its territory, whether its own subjects or foreigners, commorant in the land. With respect to its own subjects, this right, it is claimed, includes not only the power to prohibit their egress from its territory, but also to recall them from other countries; and, with respect to commorant foreigners, not only to regulate their local obligations, but to confer upon them such privileges and immunities as it may deem proper. It may therefore change their nationality, by what is called *naturalisation*. It is believed that every State in Christendom accords to foreigners, with more or less restrictions, the right of naturalisation, and that each has some positive law or mode of its own for naturalising the native-born subjects of

<sup>1</sup> Westlake, *Private International Law*, §§ 7 et seq.; Phillimore, *On Int. Law*, vol. i. §§ 315 et seq.; Reg. v. Arnaud, 9, Q. B. 817.

'Local allegiance is such as is due from an alien or stranger born, for so long a time as he continues within the King's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another.'—Blackst. *Comm.*, vol. i. 457.

'Natural allegiance is perpetual, local allegiance is only temporary; and for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long will the other demean himself faithfully.'—*Ibid.*

'A *denizen*,' said Lord Bacon in his speech as counsel in Calvin's case, 'is one that is but *subditus insitivus*, or *adoptivus*, a subject engrafted or adopted, and is never by birth, but only by the King's charter, and by no other means, come he never so young into the realm or stay he never so long. Mansion or habitation will not indenize him; no, nor swearing obedience to the king in a leet, which doth in law the subject, but only as I said, by the king's grace and gift. To this person the law giveth an ability and capacity abridged, not in matter but in time. And as there was a time when he was not subject, so the law doth not acknowledge him before that time. For if he purchase freehold after his denization he may take it, but if he have purchased any before he shall not hold it; so if he have children after, they shall inherit it; but if he have any before they shall not inherit.' A *denizen*, therefore, may be considered to be a person on whom the king, by his own authority, was empowered to bestow certain of the privileges of a British subject. Letters of denization are still granted.

other States, without reference to the consent of the latter for the release or transfer of the allegiance of such subjects. It seems, therefore, that, so far as the practice of nations is concerned, the right of naturalisation is universally claimed and exercised, without any regard to the municipal laws of the States whose subjects are so naturalised. It may also be remarked that this right, as a general proposition, is admitted and affirmed by most writers of acknowledged authority on international law. From the generality and extent of this right of naturalisation, it has been inferred that the right of expatriation is equally broad and comprehensive. And this inference is undoubtedly correct, so far as the rules of general public law are applicable; or, in other words, so far as they do not conflict with the proper exercise of the municipal power of particular States, within the limits of their own territory. But it is claimed that each State has the exclusive power to permit or deny the exercise of this right to its own citizens, within the orbit of its own jurisdiction. At any rate, this right of municipal legislation is exercised almost as generally as that of naturalisation.<sup>1</sup>

<sup>1</sup> Foelix, *Droit International Privé*, §§ 27-55; Cushing, *Opinions U. S. Attys Genl.*, vol. viii. pp. 125 et seq.; Dou, *Derecho Público*, t. i. cap. xvii.; Riquelme, *Derecho Internacional*, t. i. p. 319; Heffter, *Droit International*, § 59; Bello, *Derecho Internacional*, pt. ii. cap. v. § i.

By the common law of England, all persons above the age of twelve years were required to take the oath of allegiance in courts leet.

There are several statutes requiring the oath of *allegiance* and supremacy to be taken under penalties: justices of the peace might summon persons above the age of eighteen years to take these oaths.—1 Eliz. c. 1; 1 W. and M. c. 18; 1 A. st. 1. c. 22.

By British proclamation of Feb. 19, 1793, it was declared that all seafaring men, being natural born subjects, in the pay of any foreign State or service of any foreign vessel, were ordered, according to 'their known and bounden duty and allegiance,' to quit such foreign service and return home; that no seamen were to engage themselves to any State or vessel without a license; that any offenders would be proceeded against for their contempt, and if taken by the Turks, Algerines, or any others, would not be reclaimed as subjects of Great Britain. A similar proclamation was issued in 1807, further declaring that no letters of naturalisation or certificates of citizenship could divest natural-born subjects of their allegiance or duty.

In 1863 the British Government considered that it was not unreasonable for the United States to require military service from those British subjects who had become owners of land by virtue of their declared intention to become American citizens.—*Parl. Papers*, No. 455, 1863.

On May 9, 1864, certain instructions were issued by the United States' Secretary of the Navy respecting persons taken in blockade runners, which provided that 'when there is no reason to doubt that those who claim to be foreign subjects are in reality such, they will be



§ 3. The laws of Great Britain permit the naturalisation of foreigners without reference to their primitive allegiance, and without requiring any abjuration, by the new subjects, of their original sovereign or country. Formerly, an act of parliament was necessary in each particular case, but since 1844, aliens may be naturalised as British subjects by presenting a petition to one of the principal secretaries of State. In every country of continental Europe the executive branch of the government possesses the power of naturalisation, subject, in some cases, to certain specified restrictions. A distinction, however, is generally made between the native and naturalised citizen with respect to political rights. By the constitution of the United States, congress have power to establish a uniform rule of naturalisation, and this power is recognised by the supreme court as being exclusive of that of the individual States. The act of March 26, 1790, prescribed the taking of an oath or affirmation to support the constitution, but required no abjuration of former allegiance. The act of January 29, 1795, required, among other things, a renunciation of all foreign allegiance, particularly to the prince or State of whom the applicant was a subject or citizen.<sup>1</sup> There is much less uniformity in the municipal codes of different States with respect to denationalisation. The English jurists and publicists almost unanimously deny the right of expatriation, to the extent of a change of primitive allegiance, without the consent of the liege lord.<sup>2</sup> By the laws of France, a Frenchman loses his native character—by naturalisation in a foreign country, by accepting office under a foreign government without the permission of his own, or, by so establishing himself abroad as to show an intention of never returning. In Austria, national character is lost by authorised emigration

required to state under oath that they have never been naturalised in this country, have never exercised the privileges of a citizen thereof by voting or otherwise, and have never been in the pay or employment of the insurgent or so-called Confederate Government.<sup>3</sup>

In July, 1864, a question was raised as to the position of British subjects residing at Memphis, U.S., then under martial law, and Lord Lyons was instructed to inform them that Great Britain could not interfere with the operation of that law in a foreign State, and that British subjects who wished to secure British protection must discontinue their residence in places under such military control.—*Parl. Papers*, No. 363, 1864.

<sup>1</sup> And see the U.S. Acts of June 18, 1798; April 14, 1802; March 26, 1804; May 26, 1824; July 17, 1862.

<sup>2</sup> But see 33 Vict. c. 14, s. 6.

from the empire *sine animo revertendi*; but emigration is not permitted without the license of the proper administrative authorities. So, in Prussia, the subject loses his national character by emigration, when such emigration is duly authorised.<sup>1</sup> In Bavaria, the right of citizenship is lost by emigration, or by the acquisition, without the special permission of the king, of *jus indigenatûs* in a foreign State. In Wurtemberg, citizenship is lost by emigration authorised by the government, or by the acceptance of a public office in another State. In Russia, the quality of a subject is lost by residence abroad, by voluntary expatriation, and by disappearance for the term of ten years from the place of his domicile.<sup>2</sup> Spain and the Spanish American republics contemplate and provide for the voluntary expatriation of their citizens and subjects, the right of expatriation, however, being made subject to certain conditions and restrictions. In several of the States of the American union expatriation is provided for and regulated by law, but this has reference only to allegiance due to the State, citizenship of a State being essentially different from citizenship of the United States, and a renunciation of allegiance to the former does not draw after it a renunciation of allegiance to the latter.<sup>3</sup> There is no statute of the United

<sup>1</sup> He also loses it, by sentence of a competent authority, by living ten years in a foreign country, or by marriage (if a female Prussian subject) with a foreigner.

Subjects living in a foreign country may lose their quality as Prussians, by a declaration of the police authorities of Prussia, if they do not obey within the time fixed to them, the express summons for returning to their country.

Prussian subjects who either,—

(1) Leave the States without permission, and do not return within ten years; or

(2) Leave the States with permission, but do not return within ten years after the expiration of the time granted by the said permission, lose their quality as Prussian subjects.

The entering of a subject, into public service in a foreign State, is allowed only after his discharge has been granted to him. Anyone who has obtained it is permitted to do so without restriction.

A Prussian subject who,—

(1) Either takes public service in a foreign State with the immediate permission of his own Government;

(2) Or is appointed in Prussian States by a foreign power in an office established with Prussian permission, as, for instance, that of Consul, Commercial Agent, &c., remains in his quality as a Prussian.

<sup>2</sup> But see the new Russian laws of March 6, 1864.

<sup>3</sup> The conditions of citizenship in the United States and of any one of the States are not identical, that is to say, it may happen that by the



States on the subject of expatriation and allegiance, but our naturalisation laws seem to be based on the principle that every individual has the right to change his allegiance, and such has been the language of our diplomatic communications. The decisions of our Federal courts have generally been in reference to attempted expatriation and national character in time of war, and, therefore, in reference to international rather than municipal law. But, while recognising, in common with the admiralty tribunals of England, a change of domicil for commercial purposes, the United States supreme court has in no instance admitted the extinct right of expatriation, independently of an act of congress to authorise it. In the case of *Inglis v. Sailors' Snug Harbour*, that tribunal seems to have adopted the opinion that allegiance 'rests on the ground of a mutual compact between the government and the citizen or subject,' and that it 'cannot be dissolved by either party without the concurrence of the other;' and equally strong expressions are used in its decisions in other cases. Chancellor Kent says: 'From a historical review of the principal decisions in the Federal courts, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States, without the permission of government, to be declared by law; and that, as there is no existing regulation on the case, the rule of the English common law remains unaltered.' Others, however, contend, that inasmuch as our naturalisation laws admit the general doctrine of the right of expatriation, and the consequent transfer of native allegiance, citizens of the United States may expatriate themselves, in time of peace, the consent of the government being implied

laws of a given State a person shall be a citizen thereof and still not be a citizen of the United States. Nor does it follow because he is a citizen of a given State by the very letter of its laws that, therefore, he is of every or any other State. Persons may be, and in fact are, citizens of the State of Massachusetts, that is, invested with all the rights, political and municipal, which its institutions can bestow without being citizens of the State of Virginia or of the United States. There are certain material advantages attached to citizenship. Many ordinary municipal rights are by other laws capable of being enjoyed by citizens alone, such as the ownership of merchant ships, the command and in part the manning of such ships, and the purchase of public lands by pre-emption. To this may be added that, in many of the States, the right to own land, within the same, is by their laws restricted to citizens of the United States.—See *Opinions of Att'ys Genl. of U. S.*, vol. viii. p. 139.

By the laws of New York no person can hold a civil office or vote at elections who is not a citizen of that State.

in the absence of any legislative prohibition. The same writers, however, admit that such consent can never be presumed where expatriation is resorted to in order to escape the punishment of crime, or the performance of obligations already incurred. The renunciation of nationality, they say, does not release him who avails himself of it from any of the obligations which he owes either to his country or to his countrymen, nor can it ever be appealed to as a mask to cover crime. In other words, they maintain that there is no such thing as an absolute or indefeasible right of expatriation, any more than there is an absolute or indefeasible right of allegiance. 'Allegiance in these United States,' says Chief Justice Robertson, 'whether local or national, is, in our judgment, altogether conventional, and may be repudiated by the nation as well as adopted citizen, with the presumed concurrence of the government, without its formal or express sanction. . . . The political obligations of the citizen, and the interests of the republic, may forbid a renunciation of allegiance by his mere volition or declaration, at any time and under all circumstances. And, therefore, the government, for the purpose of preventing abuse and securing the public welfare, may regulate the mode of expatriation. But when it has not prescribed any limitation on this right, and the citizen has, in good faith, abjured his country, and become a subject or citizen of a foreign nation, he should, as to his native government, be considered as denationalised.'<sup>1</sup> Mr. Attorney

<sup>1</sup> 'Our code,' says Mr. Attorney-General Bates, "unlike the code of France, and perhaps some other nations, makes no provision for loss or legal deprivation of citizenship. Once a citizen, whether *natus* or *datus* (as Sir Edward Coke expresses it), always a citizen, unless changed by the volition and act of the individual. Neither infancy nor madness nor crime can take away from the subject the quality of citizen. And our laws do, in express terms, declare women and children to be citizens. See for one instance the Act of Congress of February 10, 1855, 10 Stat. 604.'

'The constitution of the United States does not declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship. It leaves that quality where it found it, resting upon the fact of home birth, and upon the laws of the several States. Even in the important matter of electing members of Congress, it does no more than provide that the House of Representatives shall be composed of members chosen every second year *by the people* of the several States, and the *electors* in the several States shall have the qualifications requisite for the electors of the most numerous branch of the State Legislature. Here the word *citizen* is not mentioned, and it is a legal fact, known, of course, to all lawyers and publicists, that the constitution of



General Cushing, in commenting upon this decision, says, that it places the question upon 'its true foundations'—'expatriation, a general right, subject to regulation of time and circumstances according to public interests, and the requisite consent of the State, presumed where not negated by standing prohibitions.'<sup>1</sup>

§ 4. It is thus seen that, while public international law

several of the States, in specifying the qualifications of electors, does altogether omit and exclude the words *citizen* and *citizenship*.' . . . .

'From this it is manifest that American citizenship does not necessarily depend upon, nor co-exist with, the legal capacity to hold office and the right of suffrage, either or both of them. The constitution of the United States, as I have said, does not define citizenship, neither does it declare who may vote nor who may hold office, except in regard to a few of the highest functionaries. And the several States, as far as I know, in exercising that power, act independently and without any controlling authority over them, and hence it follows that there is no limit to their power in that particular but their own prudence and discretion, and, therefore, we are not surprised to find these faculties of voting and holding office are not uniform in the different States, but are made to depend upon a variety of facts purely discretionary, such as age, sex, race, colour, property, residence in a particular place, and length of residence there.' . . . .

'We have *natural born* citizens (Constitution, article ii. § 5) not made by law or otherwise, but *born*. And this class is the large majority, in fact, the mass of our citizens; for all others are exceptions, specially provided for by law. As they become citizens in the natural way *by birth*, so they remain citizens during their natural lives, unless by their own voluntary act they expatriate themselves and become citizens or subjects of another nation. For we have no law (as the French have) to *decitizenise* a citizen who has become such, either by the natural process of birth or by the legal process of adoption. And in this connection the Constitution says not one word, and furnishes not one hint in relation to the colour or to the ancestral race of the natural born citizens. Whatever may have been said in the opinion of judges and lawyers, and in State statutes, about negroes, mulattoes and persons of colour, the Constitution is wholly silent upon that subject. The Constitution itself does not make the citizens (it is, in fact, made by them). It only intends and recognises such of them as are natural—home born—and provides for the *naturalisation* of such of them as are alien—foreign born—making the latter, as far as nature will allow, like the former.'—Extracts of *Opinion* of Mr. Attorney-General Bates, U.S., Nov. 29, 1862.

<sup>1</sup> Gunther, *Das Europäische Völkerrecht*, b. ii. p. 309; Wheaton, *Elem. Int. Law*, app. No. i.; Jenkins, *Life of Sir L.*, vol. ii. p. 713; Cushing, *Opinions of U. S. Att'ys Genl.*, vol. viii. pp. 125 et seq.; May, *Droit Public de Bavière*, tome ii. §§ 159, 160; Weishaar, *Droit Privé de Wurtemberg*, tome i. §§ 74-78; *Revue Etrangère*, tome i. pp. 552, 553; Bowyer, *Constit. Law of England*, p. 406; Kent, *Com. on Am. Law*, vol. ii. p. 49; *Inglis v. Sailors' Snug Harbour*, 3 *Peters R.*, 125; *Talbot v. Janson*, 3 *Dal R.* 383; the United States *v. Williams*, 2 *Cranch R.*, 82, note; *Janson v. the 'Christina Magdalena'*, *Bee's R.*, 11; the United States *v. Gillies*, 1 *Peters C. C. R.*, 159; *Shanks v. Dupont*, 3 *Peters R.*, 242; *Ainslie v. Martin*, 6 *Mass. R.*, 460; *Jackson v. Burns*, 3 *Binney R.*, 75; *Murray v. McCarty*, 2 *Mumf. R.*, 393; *Alsberry v. Hawkins*, 9 *Dana R.*, 177; *Burlamaqui, Droit de la Nature*, pt. ii. ch. v. § 13; *Almeda, Derecho Publico*, tome i. cap. xvii.

recognises the right of one State to naturalise the native subjects of another, and consequently the right of such subjects to change their nationality, it also recognises the right of this other State to regulate the allegiance of its own subjects, and to regulate or prohibit their expatriation. There is an apparent inconsistency in these two rules, for how can any particular State, by its municipal law, qualify a general maxim of international jurisprudence, or prevent the application to its own subjects, of an established principle of public law? This inconsistency, however, is more apparent than real. It must be remembered, that although international law recognises the right of one State to naturalise or adopt the subjects of another, it is not *in virtue of this public law* that such citizen is naturalised or adopted, but *by virtue of the positive or municipal law of the country* which naturalises or adopts them. The *newly made* citizen is entirely the *creature* of municipal law, and is invested only with such rights, privileges, and immunities as that law is capable of conferring upon him. So, on the other hand, while international law recognises the right of one State to retain the allegiance of its subjects, or to expatriate them, the tie which binds them is not formed, or its nature determined, by *public law*, but by the *municipal code* of such State. As the municipal law *makes* the citizen by naturalisation, so, also, it *retains* or *unmakes* him, by retaining or dissolving his allegiance. Admitting, then, that the right of expatriation, in its broadest and most comprehensive sense, is recognised as a maxim of international law, this principle must be subordinate to the universally conceded doctrine of the same law, that every independent State possesses exclusive sovereignty within its own territory, that its laws bind all persons within its own jurisdiction, but cannot operate within the territory of another power. It results from this view of the question, that so long as the naturalised citizen remains within the territory and jurisdiction of his adopted country, or within the jurisdiction of any other State than that which claims his primitive allegiance, he retains the national character conferred upon him by naturalisation. But if, having renounced his primitive allegiance without the consent of his government, and contrary to its laws, he return to his native State, and places himself within its jurisdiction, he is subject to the obligations, charges, and penal-



ties which the laws of that State have imposed upon him. And this result seems to have been acquiesced in by the executive department of the government of the United States, which government is supposed to have adopted the most liberal views with respect to the general right of expatriation and naturalisation. In the case of Martin Koszta, a native of Austria, but claiming the right of domicil and naturalisation in the United States, Mr. Secretary Marcy denied the right of Austria to enforce her claim to native allegiance in *Turkish* territory, outside of the limits of Austrian jurisdiction; but in the case of Simon Tousig, who had voluntarily returned to Austria, and placed himself within the reach of her municipal laws, Mr. Marcy declined making any demand for his release. In the case of J. P. Knacke, a naturalised citizen of the United States, who, on his return to his native country (Prussia), had been forced into the Prussian military service, Mr. Wheaton, the American minister at Berlin (July 24 1840), said: 'Had you remained in the United States, or visited any other foreign country (except Prussia) on your lawful business, you would have been protected by the American authorities at home and abroad, in the enjoyment of all your rights and privileges as a naturalised citizen of the United States. But having returned to the country of your birth, *your native domicil and national character revert* (so long as you remain in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated.' In the case of Ignacio Tolen, a native of Spain, but naturalised in the United States, Mr. Secretary Webster (June 25, 1852) said: 'If that government (Spain) recognises the right of its subjects to denationalise themselves and assimilate with the citizens of other countries, the usual passport will be a sufficient safeguard to you; but, if allegiance to the crown of Spain may not legally be renounced by its subjects, you must expect to be liable to the obligations of a Spanish subject, if you voluntarily place yourself within the jurisdiction of that government.' Again, in the case of Victor B. Depierre, a native of France, naturalised in the United States, Mr. Webster (June 1, 1852) said: 'If, as is understood to be the fact, the government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully

claim their services when found within French jurisdiction.' Mr. Secretary Everett, in a dispatch to the American minister at Berlin (January 14, 1853), says: 'If a subject of Prussia, lying under a legal obligation in that country, to perform a certain amount of military duty, leaves his native land, and without performing that duty, or obtaining the prescribed certificate of emigration, comes to the United States and is naturalised, and afterward, for any purposes whatever, goes back to Prussia, it is not competent for the United States to protect him from the operation of the Prussian law.' Mr. Secretary Cass, in the case of Le Clerc, in 1859, seemed to rest this question upon the same ground as his predecessors; but in the case of Hofer (June 14, 1859), and in his dispatch to the American minister at Berlin (July 8, 1859), he took the position that 'the doctrine of perpetual allegiance is a relic of barbarism,' repudiated by the United States 'ever since the origin of our government.' 'The moment a foreigner becomes naturalised, his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character, than if he had been born in the United States. Should he return to his native country, he returns as an American citizen, and in no other character. In order to entitle his original government to punish him for an offence, this must have been committed whilst he was a subject, and owed allegiance to that government. The offence must have been complete before his expatriation. It must have been of such a character that he might have been tried and punished for it at the moment of his departure. A future liability to serve in the army will not be sufficient, because, before the time can arrive for such service, he has changed his allegiance, and has become a citizen of the United States.' This position is certainly somewhat in advance of that assumed in the previous diplomatic correspondence of our government, and, by some, is thought to infringe upon the universally conceded principle that sovereign States have the right of municipal legislation and jurisdiction over all persons within their own territory; and that while we have a perfect right, *within our jurisdiction*, to disregard the dogmas of universal allegiance incorporated in



the laws of other States, they have an equally incontestable right, *within their jurisdiction*, to assume that *our* municipal regulations on the subject of naturalisation do not cancel *their* statutes enjoining the charges and obligations, military or otherwise, which spring from the theory of allegiance embodied in *their* laws. If this view of Mr. Cass be correct, the right of expatriation is not only general but indefeasible, except in the single case specified, of offences against his native State which are *completed* and punishable at the moment of his departure, and before his voluntary expatriation. Treason, then, committed by a subject, *after* 'the moment of his departure' from his own country, if not 'complete before his expatriation,' is not liable to punishment, should he return to his native State with his certificate of foreign naturalisation, for his adopted country may claim him as its own subject, and enforce his release. Moreover, it would be bound to do so, as much as if he were native-born, and never had owed any other allegiance.<sup>1</sup>

§ 5. But whatever may be thought of the effect of the doctrine of allegiance upon the national character of the subject within his native State, it certainly can produce no effect without the limits of its jurisdiction, for, even admitting that doctrine in its full extent, the obligations resulting therefrom

<sup>1</sup> *Vide* authorities in § 3; also, *American State Papers, For. Rel.*, vol. i. p. 169; Marcy, *Letter on Koszta's Case*, Sept. 26, 1853; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 6, note; Webster's *Works*, vol. vi. p. 521; Gardner, *Institutes*, pp. 448 et seq.; Webster, *Letter to Sharkey*, July 5, 1852; *Cong. Doc's*, 32nd Cong., 1st sess. H. R., *Ex. Doc.*, No. 10; 33rd Cong., 1st sess. H. R., *Ex. Doc.*, No. 41.

Æneas Macdonald was tried at the court of King's Bench, in 1747, before Lord Chief Justice Lee, for having been concerned in the rebellion of 1745. He pleaded that he was an alien born in France, and had acted under a French commission, thereby entitling him to the privileges of the cartel between England and France for the exchange or ransom of prisoners. The court declared that it never was doubted that *a subject born, taking a commission from a foreign prince, and committing high treason, may be punished notwithstanding his foreign commission*. It is not in the power of any private subject to shake off his allegiance and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalising or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown. Macdonald was found guilty of high treason. He was afterwards pardoned on condition of his leaving the realm.—*State Trials*, xviii. The leniency shown to him contrasts favourably with the treatment of Elija Clarke, a native of the United States, who was hanged by the Americans as a traitor and spy in 1812, though he also set up the defence that he was an alien, having been domiciled in Canada.—*Braken—Miscell.* 409.

are binding only within the State to which the individual originally belonged, without affecting, with reference to his adopted country, the validity of his naturalisation there. And the nationality thus assumed must, according to the rules of international jurisprudence, be recognised by all other States except that which claims his primitive allegiance, until it is again changed by the municipal code of some State within whose jurisdiction he may eventually place himself. Nor does this abstract question of native allegiance affect national character, as determined by personal domicile; for it is a general rule of public law that every person of full age has a right to change his nationality by choosing another domicile. It follows, then, that when a person who has attained his majority removes to another place, and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period.

§ 6. The national character of a merchant is determined by his *commercial domicile*, and not by the country to which his allegiance is due, either by his birth, or by his subsequent naturalisation or adoption. He is regarded as a political member of the nation into which, by his residence and business, he is incorporated, and as a subject of the government which protects him in his pursuits, and to the support of which he contributes by his property and his industry. This rule of decision is adopted both in prize courts and in courts of common law, and is applied, in a belligerent country, to its own native subjects, as well as to those of a neutral power. Thus, a citizen of the United States who is settled abroad, during a war to which his government is a party, is, with respect to his property and trade, subject to all the disabilities of an alien enemy, or entitled to all the privileges of a neutral, according to the hostile or neutral character of the country in which he has fixed his domicile.<sup>1</sup>

<sup>1</sup> Dalloz, *Répertoire*, verb. 'Domicile,' § 34; Wilson v. Marryatt, 8 Term R., 31; the 'Vigilante,' 1 Rob., 1; the 'Endraught,' 1 Rob., 19; the 'Frances,' 1 Gallis. R., 614.

The powers of a commercial traveller must be ruled by the laws of the place where they were granted, and not by those of the place where his business transactions are being carried on. (Superior Tribunal of Commerce of the German Empire at Leipsic, December 10, 1871.)



§ 7. The legal term *domicil* has been variously defined. According to the Roman law, 'In whatever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and to which, when he has returned, he is considered to have returned home:—in that place, there is no doubt whatever, he has his domicil.' Proudhon considers 'domicil to consist of the *moral relation* subsisting between a man and the place of his residence,' as distinguished from *physical existence* or actual residence. Phillimore says: 'Domicil answers very much to the common meaning of our word *home*, and where a person possessed two residences, the phrase *he made the latter his home*, would point out that to be his domicil.' He, however, considers the definition of Judge Rush, in the American case of *Guier v. Daniel*, as the best, viz: 'A residence at a particular place, accompanied with positive or presumptive proof of intention to remain there for an unlimited time.'<sup>1</sup>

<sup>1</sup> Phillimore, *Law of Domicil*, §§ 11–16; D'Argentré, *ad Leg. Brittorum*, art. ix. v. 4; Desquiron, *Traité du Domicile*, p. 42; Proudhon et Valette, *Des Personnes*, tome i. ch. ix.; *Guier v. Daniel*, 1 *Binney Rep.*, p. 349, note.

The following instructions were furnished to the Hon. W. Stuart, the British Chargé d'Affaires in the U.S., in 1862:—'A domicil established by length of residence only, without naturalisation, or any other formal act whereby the domiciled person has, so to speak, incorporated himself into the State in which he resides, does not for the time convert him into a subject of the domicil, in all respects, save the allegiance he owes to his native sovereign. Such a domiciled person is not a *civis*, but a temporary subject, *subditus temporarius*, of the State in which he is resident. He cannot lawfully be compelled to serve in the military forces of that State against any other State, or be compelled to enrol himself in the militia of the State, though it would be his duty to co-operate with native citizens, when called upon to do so by the proper authorities, in keeping the peace and preserving good order in the particular place in which he resides, as for instance, against thieves and pirates.'

In accordance with these instructions, Lord Russell addressed a circular dispatch to the British Consuls in the Southern States, on October 11, in the same year, directing them to remonstrate strongly against the forced enlistment of British subjects, pointing out that British subjects, domiciled only by residence in the so-called Confederate States, could not be forcibly enlisted in the military service of those States by virtue of an *ex post facto* law, when no municipal law existed, at the time of the establishment of their domicil, rendering them liable to such service. It may be competent to a State in which a domiciled foreigner may reside to pass such an *ex post facto* law, if, at the same time, option is offered to foreigners affected by it to quit, after a reasonable period, the territory, if they object to serve in the armies of the State; but, without this option, such a law would violate the principles of international law, and even

§ 8. Various decisions have been made by the different writers who have treated of domicil. Some authors have divided it into two kinds, *principal* and *accidental*, the former being the centre of a person's affairs, and the latter his place of residence for a part of his time, or for a particular purpose. Another division is into *personal* and *commercial*, the former having reference to a person's personal or actual residence, and the latter to his place of business or trade. Kent says: 'There is a *political*, a *civil*, and a *forensic* domicil.' This division is sufficiently explained by the terms employed. Others, again, divide domicil according to birth, necessity, and will, as, 1. Domicil of Origin (*Domicilium originis*); 2. Domicil by Operation of Law (*Domicilium Necessarium*); 3. Domicil of Choice (*Domicilium Voluntarium*). Domicil of origin has reference, *first*, to the place of nativity, and *second*, to the residence of the parents, where the birth takes place during a temporary or accidental absence from their own domicil. Domicil by operation of law comprises two classes, *first*, as determined by the laws of the State from which they are sent, as in the case of public officers employed in foreign countries, and persons exiled by way of punishment; and *second*, as determined by the laws of the place of residence. Domicil of choice may be considered, *first*, with reference to the laws of the place where a new residence is acquired, and *second*, with reference to the laws of the place where the former residence has been abandoned. All these are so intimately connected, and the latter so dependent upon the former, that it would be difficult to discuss each separately. We will, therefore, consider the general criteria of domicil, the rules of evidence applicable to different cases, the presumptions raised by law, and the proofs required to rebut these presumptions.<sup>1</sup>

§ 9. The question of domicil is often a very difficult one to determine, and involves considerations which require to be weighed with peculiar care. It is also sometimes connected with circumstances of varied and conflicting import, which are with such an option the comity till then observed between independent States would not be very scrupulously regarded.

In 1863, a Mr. Scott applied to the British Consul at New York for protection. He had declared his intention to become a citizen of the United States at the time of the Trent affair, and if war had broken out it was his intention to adhere to the United States, against his own sovereign. The British Government refused to interfere.

<sup>1</sup> Kent, *Com. on Am. Law*, vol. ii. pp. 429 et seq.



well calculated to embarrass the mind of the most experienced judge. The great controlling principle, however, in determining domicile is the *intention* of the party. And when his intention to reside for an indefinite period or permanently, in the place where he is found, is established by proof, the length or brevity of his actual residence is of no avail to protect him from the consequences of the national character resulting from such residence. Thus, the property of a British merchant, who removed to a Dutch West India island but a day or two before it capitulated to British force, was condemned by a British court as that of an enemy, it being proved that he had gone there with the avowed design of forming a permanent establishment.<sup>1</sup>

§ 10. But *mere intention*, without some *overt act*, is not sufficient to determine domicile, for that intention is likely to be revoked every hour. Courts have, therefore, always required, in such cases, something more than a mere verbal declaration—some solid fact, to show that the party is in the act of carrying that avowed intention into effect. Thus, an American domiciled in the enemy's country had avowed his intention to remove, as was proved by his correspondence; but, as he had taken no steps in pursuance of that intention, his property was condemned as that of an enemy.<sup>2</sup>

§ 11. Where the party has avowed his intention with respect to residence, and his acts have corresponded with such declaration, the question of domicile is free from embarrassment. But, in most cases, no positive declarations of the party whose domicile is in question can be proved—or, at least, none against his own interests—and it becomes necessary to deduce his intention from the circumstances of his residence, occupation,

<sup>1</sup> The 'Diana,' 5 Rob. 60; the 'Venus,' 8 Cranch R., 288; the 'Boedes Lust,' 5 Rob., 233; Munro v. Munro, 7 Cl. and Fin. R., 76; Merlin, *Répertoire*, verb. 'Domicile,' § 6.

'A mere intention to remove,' said Sir William Scott, 'has never been held sufficient without some overt act; being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter, in which this intention is said to be found, are, I observe, very weak, and general, of an intention merely *in futuro*. Were they even much stronger than they are, they would not be sufficient: something more than mere verbal declaration, some solid fact showing that the party is in the act of withdrawing, has always been held necessary in such cases.'—'The President,' 5 Rob. 279.

<sup>2</sup> The 'President,' 5 Rob., 277; the 'Citto,' 3 Rob., 38; the 'Frances,' 8 Cranch R., 335; Westlake, *Private Int. Law*, § 37.

and business relations. And these circumstances are of so mixed and varied a character as to render it impossible to embrace them all in any general definition. It is proper, however, to mention some of the most prominent of those which have heretofore influenced the decisions of the courts.<sup>1</sup>

§ 12. A most material and significant circumstance in determining the intention of the party, is the residence of his family. If he is married, and established with his family in the country where he is living, the inference is highly reasonable that he intends to reside there permanently. And, although his family may not be with him, if he has made preparations to have them join him, the same inference will be drawn. If he is not a married man, and has no social connections in the country where he is living, the court will look to other circumstances to determine his intentions. In case of double residence, the keeping up of a family *mansion house*, has much influence in determining domicile.<sup>2</sup>

§ 13. The possession and exercise of political rights, and the payment of taxes, were considered by the Roman law as strong tests of domicile; but less weight seems to be given to these circumstances in England than by the civilians. Nevertheless, when taken in connection with other facts, they are not without their influence in determining national character in war. Sir William Scott, in the case of the 'Dree Gebroeders,' said, that landed estate alone had never been held sufficient to constitute domicile, or fix the national character of the possessor, who is not personally resident upon it; and Cochin denies that real estate derived from inheritance is

<sup>1</sup> The 26 Geo. III. cap. xxx., s. 8, prohibited any subject of His Majesty whose usual residence was in any country not under the dominion of His Majesty, to be the owner in whole or in part of any registered British ship. Under that statute it was held, by Sir William Scott ('The Eleanor Hall,' 1 *Edw.* 135), that an occasional residence for the purpose of obtaining a colourable qualification would not give a title; that no person was entitled, who had not his *usual* residence in Great Britain or in the dominions belonging to the Crown, unless he was within some of the exceptions; that if a man went to another country and there had a more usual residence than in this, he was no longer entitled to the same privileges, and that a person that was continually shifting his residence between the British dominions and the American States, so as not to have what, under any extension, could be deemed his usual residence in the British dominions, did not come within the description of the statute.—See Abbott on *Shipping*, cap. ii.

<sup>2</sup> Phillimore, *Law of Domicil*, §§ 198 et seq.; the 'Jonge Ruiters,' 1 *Act. R.*, 116; Ennis et al. v. Smith et al., 14 *How. R.*, 423; Somerville v. Somerville, 5 *Ves. R.*, 749.



any proof of domicil. But, when taken in connection with actual residence, they may be received as proofs of *intention* to remain. So, of the purchase of property, real or personal; if a man has invested his capital in the country where he resides, in property, or enterprises which would require his personal attention and supervision for a long or indefinite period, or, if he has formed a partnership in business which is to continue for a number of years, the inference usually drawn from these facts is, that he intends to make that place his permanent residence, although no positive declaration to that effect is proved.<sup>1</sup>

<sup>1</sup> Cochin, *Œuvres*, tome iii. p. 328; the 'Dree Gebroeders,' 4 *Rob.*, 235.

During the civil war in the United States, all persons who had voted as State citizens were claimed by the United States Government as liable to the conscription; and the Act of the Congress of March 3, 1863, expressly declared that the levy should include 'all persons of foreign birth who shall have declared on oath their intentions to become citizens.'

Mr. Sellers, a British subject, who had announced his intention to become naturalised, applied, in October, 1862, to be informed whether he could claim the protection of the British Government. He was told that as he had so acted without consulting the British Government, he must not expect that, until a case should arise in which its interference might be requested, it would give any opinion of the view which it might take of such a case.—*Parl. Papers*, 1862.

In 1862 certain native-born British subjects in Wisconsin claimed that, although they had voted at elections, they had done so under the 'State law as aliens, and had not thereby forfeited their British nationality.'

Mr. Seward replied that so far as the executive authority of the United States was concerned, no foreigner who had not been naturalised, or who had not exercised the right of suffrage, had hitherto been required to serve in the militia.

M. Mercier, the French Minister, wrote in a circular to the French Consuls that Frenchmen who had voted illegally in the United States had no doubt rendered themselves liable to legal penalties in that country, but that they had not forfeited their French nationality, or their right as aliens to be exempt from compulsory military service. And he referred to the laws of some of the States which admit aliens to the exercise of the elective franchise.—*Parl. Papers*, No. 536, 1862. The matter was referred by Lord Lyons to the Home Government, and he was instructed to abide by the decision of the American Law Courts.

In 1863 certain able-bodied male persons of foreign birth, who had declared on oath *their intention* to become American citizens, were called upon for military duty by the United States. On this the British Government suggested that British subjects who had merely declared their intention to become American citizens, but had not exercised any political franchise, in consequence of such declaration, ought to be allowed a reasonable period after the passing of the Act to exercise the option of leaving the United States, or of continuing residing therein with the annexed conditions. The United States Government thereupon allowed sixty-five days to such persons to exercise their option, and the British

§ 14. Another material circumstance by which intention is determined, is the character of the trade, or business, in which the party is engaged. If his commercial enterprises have their origin and centre in the country of his residence, although extending to other countries, or if his business is of such a character and extent as to require an indefinite period to bring it to completion, the fair inference is, that he intends to reside there permanently, and the court will therefore regard it as his domicile.<sup>1</sup>

§ 15. Another and most significant circumstance by which the intention may be ascertained, is the *time* of residence. In most cases, this circumstance is unavoidably conclusive in determining domicile. Even where the party had first gone to a foreign country for a special purpose, which would repel the presumption that he intended to make it his permanent residence, yet if he has remained a great length of time, it will be presumed that his first intention has been changed, and that a general residence has grown, as is frequently the case, upon a special purpose. Hence, the plea of an original special purpose is not to be averred against a residence continued for a long period of time. If, however, a merchant has gone to a foreign country just before the war, for a special purpose, a fair time should be allowed to him to disengage himself; but if he should continue there during a good part of the war, contributing, by his industry and means, to the strength and security of the enemy, the plea of a special purpose cannot be urged with effect against the rights of hostility.<sup>2</sup>

§ 16. In former times the particular situation of America, Government refused to interfere on behalf of any intended citizens who had not availed themselves of the opportunity.—*Parl. Papers*, No. 337, 1863.  
<sup>1</sup> The 'Vigilantia,' 1 *Rob.*, 15; the 'Anna Catharina,' 4 *Rob.*, 118; the 'Rendsborg,' 4 *Rob.*, 121.

In 1864, Mr. Jenkins, a British subject, resident in Texas, was told that the British Government could not protect him against the conscription if he persisted in remaining in the Confederate States.—*Parl. Papers*, No. 509.

In 1865, Dr. Benson, a Canadian, applied for protection against being tried by court martial. As it appeared that he was domiciled in Kentucky, and was an army contractor, the British Government refused to interfere.—*Parl. Papers*, No. 106.

<sup>2</sup> Duer, *On Insurance*, vol. i. p. 498; the 'Harmony,' 2 *Rob.*, 322.

In 1864, Mr. Heslop, a British subject, holding landed property in Virginia, and who had been arrested at Baltimore, having requested British protection, was informed by the British Government that as the circumstances of the case showed Mr. Heslop's active connection with the Confederate Government, it was not a case for interference.—*Parl. Papers*, No. 507.



with respect to distance, was considered by the English courts as entitling the merchants of that country to some favourable distinctions in the matter of domicil, as determined by length of residence. It was, therefore, held that they might remain in an European State for a longer period than a merchant of a neighbouring country, without being considered as a permanent resident. But, with the present facilities for communication afforded by steam and telegraph, it is doubtful if this favourable distinction would now be made.

§ 17. The presumption of law with respect to residence in a foreign country, is, that the party is there *animo manendi*, and it lies upon him to explain it. Thus, when the property of a foreigner, who, at the time of its shipment, was living in a hostile country, is seized as that of an enemy, the captors are not bound to prove that his place of residence was his actual domicil; but it rests upon him to disprove the presumption of the law, and, to redeem his property from the noxious imputation, he must give such evidence of his intentions and plans as shall be effectual to destroy it.

§ 18. In order to repel this presumption of the law, it is necessary for the party to prove that his original intention was to remain only for a short and definite period, that to accomplish the purpose of his visit, neither a long nor an indefinite period would be required; that his past residence had not been long enough, by the mere operation of time, to establish a domicil, and that he had not been so mixed up with the trade and navigation of the country, as to have acquired its national character, by the very nature of his occupation. The presumption is not repelled by merely showing that his wife and family are still residing in his native country, nor by proving that he contemplates returning to his own country at some future period, or after he has accomplished some particular object. He may have separated himself from his family, or the period of his return may be wholly uncertain and indefinite; or, if definite, it may be after a long interval of time, or his neutral character may have been superseded by his occupation, or by his being so incorporated in the trade or navigation of the country, that its national character is completely fixed upon him. In order to repel this presumption of the law, he must show clearly and conclusively, that such residence in the foreign country has not by the law

of domicil, or otherwise, had any effect in changing his national character. This brings us to the examination of the different classes of what is called *necessary* domicil.

§ 19. The national character of an ambassador or public minister is not affected by his residence in a foreign country, no matter what may be its duration, or the circumstances indicative of the intent of the party to render it permanent. This results from the rule of ex-territoriality as already discussed. Being deemed a resident within the territory of his own State, the law of foreign domicil does not apply to him. But a consul does not come within this exception; although mere residence in the performance of his official duties may not confer upon him a foreign domicil, nevertheless, his consular character affords no protection to his mercantile adventures. 'If,' says Duer, 'he reside in a belligerent country, his ships and goods are liable to confiscation as those of an enemy, by the hostile belligerent; and they are subject to the same penalty in the country in which he resides, if they be employed in a trade with its public enemies, which is prohibited to its own subjects. Nor, to warrant the confiscation of his property, is it requisite that the consul should bear the character of a general merchant. If the transaction that leads to the seizure is the only commercial speculation in which he is, or ever has been engaged, he is still a merchant, so far as that transaction extends, and must bear the consequences of the character he has assumed. The rule which thus distinguishes between the commercial and the official character of a consul, may sometimes operate in his favour. Where the consul of a belligerent power is engaged as a merchant, in the commerce of a neutral country, in which he resides, his property on the ocean, if employed in a trade strictly neutral, is exempt from hostile capture. His neutral character as a merchant is unaffected by his belligerent character as consul.'<sup>1</sup>

§ 20. The French jurists have laid down the following rules respecting the domicil of officers, civil or military, employed in the public service: 1st. If the office be for life, and irrevocable, the domicil of the holder is in the place where its functions are to be discharged, and no proof of the con-

<sup>1</sup> Duer, *On Insurance*, vol. i. pp. 513, 514; the 'Indian Chief,' 3 *Rob.*, 27; the 'Josephine,' 4 *Rob.*, 25; the 'Sarah Christina,' 1 *Rob.*, 239; *Albrecht v. Sussman*, 4 *Ves. and Beams R.*, 323.



trary will be admitted, 'for the law will not presume an intention contrary to indispensable duty.' 2nd. If the office be temporary or revocable, the law does not presume that the holder has changed his original domicil, but proof will be admitted to establish the fact that he has done so. These two divisions, says Phillimore, seem to warrant a 3rd. Where the office, although for life and irrevocable, requires the holder to reside only a part of the time in the place where its functions are to be discharged, the law will presume his domicil to be in that place, but this presumption will yield to proof that the seat of his family affairs—the residence of his wife and children—is elsewhere, and that he has described himself, in all legal instruments, as belonging to the place of former domicil, and not to the place of his employment. Thus, in the case of Lord Somerville, the presumption was repelled, and it was held that his parliamentary duties in London, as a peer of Scotland, was no proof that his domicil was there. So, in the case of M. de Courtanel, it was held that the office of Grand Maître des Eaux et Forêts, not requiring a fixed residence, did not prevent the law of original domicil from operating.<sup>1</sup>

§ 21. It was a maxim of the Roman law, which has been incorporated into modern jurisprudence, that as the wife takes the rank, so does she also take the domicil of her husband; and, by the same analogy, the widow retains it after her husband's death. But if she marry again, her domicil becomes that of her second husband. The most noted case involving the domicil of the widow, was the disputed succession to the personal estate of Henrietta Maria (widow of Charles I.), who died in France. The betrothed, although in many respects enjoying the privileges of the wife, according to the Roman and civil law, retains the domicil which she had before her betrothment. It is generally considered that a wife divorced, *a mensâ et thoro*, may, after her divorce, choose her own domicil. But not so in case of a mere separation.<sup>2</sup> A

<sup>1</sup> Phillimore, *Law of Domicil*, §§ 113 et seq.; Denisart, *Domicile*, ch. ii. § 5; Duranton, *Droit Français*, liv. i. tit. iii.; *Somerville v. Somerville*, 5 *Vesey R.*, 757.

<sup>2</sup> In 1862, it was decided by the British Government, in the case of American-born widows of British subjects, that, if the American law was at variance with their own (conferring upon the wives of British subjects the privileges of natural-born British subjects), and the United

minor, who is not *sui juris*, cannot change his domicile of his own accord (*propria Marte*); his domicile is that of the father, or of the mother during widowhood, or, perhaps in some cases, of the legally appointed guardian. With respect to the question of *succession* to an intestacy, some writers contend that neither the mother nor the guardian can change the domicile of a minor whose father is deceased, while others hold the contrary doctrine; all, however, agree that the *forum* of the minor is that of the surviving parent or legal guardian.<sup>1</sup> The domicile of an illegitimate minor is that of the mother. Students, whether majors or minors, are not considered as acquiring a domicile in the place where they sojourn merely for the purpose of prosecuting their studies. Servants may,

States desired to put the American law in force, the American law must prevail, and American-born widows being resident in America would not be entitled to a certificate of being British subjects. The British Government further decided in the case of British-born subjects the widows of American or foreign husbands, that if after the dissolution of their coverture they should elect to claim the benefit of their British character, they would be at liberty to do so, and must be treated and protected as British subjects.—*Parl. Papers*, No. 189.

According to the French law, a woman legally separated from her husband recovers the right to a separate domicile.

It was held in England that a woman living abroad and apart from her husband, but not legally separated, had not a separate domicile.—*Re Daly's Settlement*, 22 *Jurist*, 525.

<sup>1</sup> The British Government decided that minors who were born in British dominions, but whose fathers had become naturalised American citizens, ought, during their minority, to be considered and treated as between the two Governments, not as British subjects, but as American citizens, and that they must continue to be so considered if after attaining their majority they had continued to remain domiciled in the United States, and had not taken any active steps to absolve themselves from their allegiance to that country.—*Parl. Papers*, *N. America*, 1861-2.

A son was born in England, of a British father subsequently naturalised in the United States; the son attained his majority at Baltimore, according to the *lex loci*, but had not exercised the rights of a citizen. With respect to this case, the British Government decided in 1863, that as a minor child follows the domicile of the father, and as the father was naturalised by the law of the United States, and the son after attaining majority had continued his domicile in, and was considered as naturalised by the law of, the United States, he must be considered as a naturalised American citizen, and not entitled to claim, as against the Government of the United States, the protection of the British Government.

A son attained his majority at Philadelphia in the United States, being born there of a British father, living in the United States but not naturalised: neither father nor son had made any declaration of intention to become citizens. In 1863, the British Government decided that it could not insist, as against the United States' Government, that such a person should be considered as a British subject, and exempt from the liabilities incident to the status of a United States' citizen.



or may not, have the same domicile as their masters, according to the particular circumstances of the case.<sup>1</sup>

§ 22. According to the Roman law, a soldier's domicile was in the country where he served, if he possessed nothing in his own country; but if he had any property in his own country, he would be allowed a double domicile.<sup>2</sup> The leading modern case on this point is that of the Duke of Guise, who contracted a marriage while in the service of the King of Spain and the Emperor of Austria, during his residence at Brussels. The validity of this marriage depended upon his domicile at the time it was contracted. By the law of all European countries, the prisoner preserves the domicile of his country. This principle is applied to the continued residence of a merchant in a foreign country. If such residence in a hostile country during a war is not voluntary, but proceeds from compulsory restraint imposed by the enemy, and his intention to leave is clearly manifested by overt acts previous to the capture of his property, it has been decided that such violent detention will not prevent its restoration. The same reasoning applies to a neutral merchant domiciled in a hostile country before the war. With respect to exiles, the civil jurists distinguish between banishment for life, and for a term of years; in the first, the exile loses his original domicile, but preserves it in the second, being regarded in the same light as a person on a long voyage. The fugitive or emigrant from his country on account of civil war, is held not to have lost his intention of returning to it, and, therefore, retains his native domicile. But if the prisoner, exile, or fugitive continue to reside in a foreign country after the coercion has been withdrawn, and after his power of choice has been restored, he may acquire a domicile therein.<sup>3</sup>

§ 23. Suppose the government of the country of residence

<sup>1</sup> Merlin, *Répertoire*, verb. 'Domicile,' § 5; Justinian, *Dig.*, 50, 1, 37; *Code* xii. 1, 13; x. 40, 9; *Donnegal v. Donnegal*, 1 *Addams R.*, p. 5; *Whitcombe v. Whitcombe*, 2 *Curt. R.*, 352; *Gambier v. Gambier*, 7 *Sim. R.*, 263; *Guyer v. O'Daniel*, 1 *Binn. R.*, 349; *School Directors v. James*, 2 *Watts and Serg. R.*, 568; *Freetown v. Taunton*, 16 *Mass. R.* 51; *Scrimshire v. Scrimshire*, 2 *Hagg. R.*, 405; *Granby v. Amherst*, 7 *Mass. R.*, 1; *Putnam v. Johnson*, 10 *Mass. R.*, 498.

<sup>2</sup> The domicile of an English officer, serving his country abroad, is in England.—*Re Phipps*, 2 *Curt. Eccles. R.*, 368; *Whyte v. Repton*, 3 *Ibid.*, 818; *Hodgson v. De Beauchesne*, 12 *Moore, P. C. R.*, 285.

<sup>3</sup> Justinian, *Dig.* l. t. i. l. xxiii.; *Westlake, Private Int. Law*, §§ 52, 53.

prohibits a foreigner from acquiring a domicile. It has been decided in France that a *de facto* domicile may be acquired, notwithstanding such prohibition, even with respect to the country of residence. This is placed on the ground that, although not entitled to the privileges of a domiciled subject, he may incur the liabilities. Again, suppose the government of a country forbade its subjects to establish a domicile out of their native land, may they not acquire a *de facto* foreign domicile? Undoubtedly they may, so far as respects their national character in war, and Phillimore is of opinion that the personal property of such subjects who have established a *de facto* domicile in a foreign country, must be distributed according to the law of the *de facto* domicile. He, however, admits that the case would be open to some argument on the other side.<sup>1</sup>

§ 24. Treaties sometimes have the effect of preserving to the resident in a foreign country his original domicile, or of giving to him a commercial domicile, neither of the country of his origin nor that of his residence. Such has been the general effect of the treaties and commercial intercourse between Christian and Mohammedan States. In the Turkish dominions the control over and disposal of their property, its exemption from municipal laws, and other privileges, have been secured to Christians by treaty stipulations. In such cases, the domicile of their own countries is considered as preserved to foreign residents in the East, the ordinary rules of the international law of domicile not being applicable to such residence. In general, European and American merchants residing in the East under the protection of trading factories, are considered as retaining the national character of the factory to which they belong. This distinction results from the nature and habits of the East, foreigners not being permitted to mix freely with the native inhabitants, or to become incorporated into the mass of society. They, therefore, always continue to be strangers and mere sojourners, no matter what may be the circumstances, or length of time, of their residence. As they cannot acquire the national character of the country where they reside, the law very properly considers them to have retained that of the country to which they belong. But this doctrine does not apply to Christian countries. An attempt was at one time made to

<sup>1</sup> Phillimore, *Law of Domicil*, §§ 301-306.



extend it to British merchants residing in Portugal, with special privileges which distinguished them from the native inhabitants, and from all foreigners of other countries; but the courts held, that the law of domicil of Europeans residing in the East was wholly inapplicable to such cases.<sup>1</sup>

§ 25. If a neutral merchant go into an enemy's country during the war merely to collect his debts, or to withdraw the property which he may have there, his temporary residence, *for that purpose alone*, will not confer upon him a hostile character, and the property and funds thus sought to be withdrawn will not be subject to confiscation. But he must bring himself clearly within the rule, for, if instead of confining himself to the legitimate object of his visit, he engages in a trade purely national, his character with respect to such trade is regarded as hostile, and the property embarked in it, if captured, is condemned. It is contended by some that a neutral merchant residing in the enemy's country at the commencement of the war, should have the same privilege of withdrawing his property, and that, for a reasonable time, it should be exempt from capture. But this doctrine has not been established by the positive adjudication of any court of prize.<sup>2</sup>

§ 26. The active spirit of commerce and enterprise in the present day, and the increased facilities for travel afforded by steam navigation and railroads, are well calculated to perplex the mind of a court in assigning accurately a merchant's national character, at different periods of a divided transaction. Thus, if he have charge of a complex mercantile business, he may be found, at no great intervals of time, in a variety of local situations, without any permanent residence in any one place. It is, therefore, held, that a merchant carrying on commerce in different countries, in time of war, has the national character of each, in his respective trades. This agrees with the maxim of the Roman law, that when a man has so set up his household goods in two different places as to be equally established in both, both are to be regarded as his domicil. It, however, was remarked by Domat (and this opinion was adopted by other jurists) that although a man may have two

<sup>1</sup> The 'Indian Chief,' 3 Rob., 29; the 'Twee Frienden,' etc., 3 Rob., 29; *Ruding v. Smith*, 2 Hagg. R., 386; *Moore v. Darell & Budd*, 3 Hagg. R., 350; *Maltass v. Maltass*, 3 Rob., 81.

<sup>2</sup> See *post*, vol. ii. p. 161.

or more domicils for particular purposes, yet it would be very difficult, if not impossible, for him to have two which should be equally the centre of his affairs. Hence municipal law, both in Europe and America, requires the characteristics of a *principal* domicil for cases of a testament, or a distribution under intestacy, while it permits the same person, at the same time, to have other domicils for certain purposes, and with respect to particular rights and property.<sup>1</sup>

§ 27. The native national character, lost, or suspended by a foreign domicil, easily reverts. The adventitious character imposed by domicil ceases with the residence from which it arose. An actual return to his native country is not always necessary, nor even an actual departure from the country of his domicil, if he has actually put himself in motion *bonâ fide* to quit the country *sine animo revertendi*. But the commencement of the journey to return to his native country, although it may restore to the party his native national character, will not exempt his property from the hostile character acquired by residence, only in cases where such property has been engaged in a trade completely lawful in the native character. The principle can never be extended to protect a trade which is illegal in a native subject or citizen. Thus, an American citizen, domiciled in England previous to the war between the two countries, shipped goods from that country a long time after the commencement of the war, and accompanied the shipment in person, with the intention of abandoning his English domicil, and resuming his American character. But his property was captured and condemned by an American

<sup>1</sup> Domat, *Traité des Loix*, liv. i. tit. xvi. § 6; Merlin, *Répertoire*, tit. viii. 'Domicile,' § 7.

What would be the case upon two contemporary and equal domicils, if ever there can be such a case? 'I think,' said the Master of the Rolls, 'such a case can hardly happen; but it is possible to suppose it. A man born no one knows where, or having had a domicil that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances; both country houses, for instance, bought at the same time. It can hardly be said that that of which he took possession first is to prevail. Then suppose he should die at one: shall the death have any effect?' I think not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail; for the country, in which the property is, would not let it go out of that, until they knew by what rule it is to be distributed. If it was in this country, they would not give it until it was proved that he had a domicil somewhere.'—*Somerville v. Somerville*, 5 Ves. 749.



prize court, on the ground that whether an English subject, or an American citizen, his property was liable to confiscation,—if the former, as that of an enemy; and if the latter, as that of a citizen unlawfully trading with an enemy. The mere return of a party, whether a belligerent subject or a neutral, to his native country, is not sufficient, of itself, to restore his native character. If he merely returns for a visit, or temporary purpose, and designs to resume his former residence, the character impressed on him by his foreign domicil remains unchanged. In other words, his domicil, once established, is not broken by a temporary change of residence, and his property on the ocean, although shipped or captured during his absence, remains liable to confiscation.

§ 28. In the application of the general rule that the native character of the party must be taken from that of the country where he resides, there is a material difference between removing from, and returning to, one's native country. Although the native character remains till a new domicil is acquired by actual residence or settlement in a foreign country, the adventitious character resulting from domicil ceases with the residence from which it arose. But, according to the decisions of the courts of the United States, it is not sufficient to prove the mere intention of the party to return to his native country for the purpose of remaining there permanently; he must have actually commenced to return. The British courts, however, have, in some cases, considered other overt acts, when performed in good faith, as sufficient to restore the native national character, and in this opinion, Chief Justice Marshall coincided.<sup>1</sup>

<sup>1</sup> 'The father of Joseph Celt, and his wife, who was *enceinte*, inhabiting Calais when it was taken by the French, fled into Flanders, and there the woman was delivered of the said Joseph; and it was adjudged that he shall be entitled to the privileges of a natural-born British subject, under the Act 25 Edward III., because the parents were born in Calais, and he himself was begotten there, though born in Flanders.'—Chitty, *Comm. Law*, vol. i. 118. However, Lord Coke states that 'the time of his birth is of the essence of a subject born,' so that it is unnecessary to go back beyond that period to decide a subject's allegiance.

In 1863, Mr. Mackett, a natural-born British subject, who had not been naturalised, having been arrested in the United States, applied for redress; but it being shown that he had voted at elections, the British Government refused to interfere.

In 1863, Mr. Hamilton, an Irish gentleman, who had been naturalised in the United States, and who had returned to Ireland, being about to

§ 29. It seems to be a well-settled principle of international law that, during the existence of hostilities (*flagrante bello*), no subject of a belligerent can transfer his allegiance or acquire a foreign domicile by emigration from his own country, so as to protect his trade either against the belligerent claims of his own country, or against those of a hostile power. In other words, his allegiance continues the same, and his native character is unaffected by his change of residence. This doctrine rests on the ground that to desert one's own country in time of war, is an act of criminality, and that if a citizen removed to another State, his allegiance is still due to his sovereign, and he is as much bound to abstain from trade with a public enemy as if he had remained at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation, by an opposite belligerent. This principle is sanctioned by the most approved writers on international law, and has been expressly affirmed by the courts of the United States. The doctrine above announced is not in conflict with that contended for by some writers, that a citizen has a general right of expatriation in time of peace, and that the assent of his government to seek change of go back to the United States, requested to know whether he could resume his British nationality previously to doing so, and was told that the British Government could not promise to afford him protection against any obligations which the laws of the United States might impose upon persons who had been naturalised in that country.

In 1864, in the case of one Cole, it was decided by Great Britain that the children of American citizens born in British territory, but being in American territory, could not claim the protection of the British Government to exempt them from American military service.—*Parl. Papers*, No. 200.

In 1862, the British Government decided that a natural-born British subject, who had been naturalised in the United States, would not be recognised by the British Government within the United States as a British subject, but if he returned to British territory, his native allegiance would revert. In the event of the independence of the Confederate States being established, the British Government would not have interfered on behalf of such naturalised Americans, and their status would have been left to be determined by the Government of those States. Naturalised citizens would have had a right to claim from the United States to be treated, with regard to a transfer of allegiance, in the same manner as native citizens. Until, however, the independence of the Confederate States was recognised, the United States were justified in enforcing against all persons resident therein, the obligations of the oath of allegiance which they had taken. If the Confederate States had become independent, the British Government was not bound, nor were the Confederate States, to recognise such persons as British subjects, nor would their return to Great Britain and renunciation there of their United States' allegiance have made any difference in this respect.—*Parl. Papers*, N. Amer., 1861-62.



allegiance and national character is implied in the absence of any prohibition. Nor is it to be construed as denying to a citizen the right to change his allegiance and national character in time of war, with the express consent of the State, and with authentic renunciation of pre-existing citizenship. But expatriation, in time of war, does not result from a change of residence, and the general consent of the State to emigration, which is presumed, in time of peace, from the absence of any general prohibition. If so, it might be appealed to as a mask to cover desertion, or treasonable aid to the public enemy.<sup>1</sup>

§ 30. Mere military occupation of a territory by the forces of a belligerent (without confirmation of conquest by one of the modes recognised in international law), does not, in general, change the national character of the inhabitants. It will be shown in a subsequent chapter, that the allegiance of such inhabitants is temporarily suspended, but not actually transferred to the conqueror. They owe to such military occupants certain duties, but these fall far short of a change of the allegiance due to their former sovereign. But if the military occupation be by a power in amity with the former sovereign, and has taken place with the evident concurrence of those acting under his authority, a prior and former cession is presumed. The national character of the inhabitants is therefore deemed to be changed by the presumed transfer of their allegiance. Thus, the occupation of the Ionian republic by French troops, by the voluntary surrender of the Russian authorities, then at peace with France, was deemed sufficient to repel the supposition that such occupation was hostile and temporary, and therefore sufficient to raise the presumption of a formal cession, although none was proved. So of the inhabitants of territory in the possession and under the government of the conqueror prior to cession or complete conquest, for every commercial and belligerent purpose they are considered by other countries as subjects of the conqueror, notwithstanding that he himself may regard them as aliens with respect to the inhabitants of his other dominions. Upon this point, however, there are conflicting decisions, belligerents

<sup>1</sup> The 'Dos Hermanos,' 2 *Wheat. R.*, 98; *Talbot v. Janson*, 3 *Dallas R.*, 162; the 'Santissima Trinidad,' 7 *Wheat. R.*, 284; *Duguet v. Rhineland*, 1 *Johns. Cas.*, 360; *Jackson v. N. Y. Ins. Co.*, 2 *Johns. Cas.*, 191; *United States v. Williams*, 2 *Cranch. R.*, 82, note; *Murray v. the 'Charming Betsey'*, 2 *Cranch. R.*, 64.

having sometimes regarded territory in the military occupation of their enemy as friendly, and sometimes as hostile, according to their own interests and the peculiar circumstances of the case. If the sovereign power of the State choose to permit a continuance of commerce with them, the courts of the same State will regard them as friendly, and *vice versa*.<sup>1</sup>

§ 31. It will also be shown hereafter that, where the con-

<sup>1</sup> The 'Roletta,' *Edw. R.*, 171; *Benson v. Boyle*, 9 *Cranch. R.*, 191; *Hagedorn v. Bell*, 1 *M. and Selw. R.*, 450.

A temporary occupation of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies; this was clearly shown in the case of the 'Gerasimo.'

At the time of her capture this ship was bound to Trieste with a cargo of Indian corn, which she had taken on board at Galatz. She was sailing under Wallachian colours, and on July 19th, 1854, during the prosecution of her voyage, was captured as she was coming out of the Sulina mouth of the Danube, by H. M. S. 'Vesuvius,' under the command of Captain Powell. The captors appear to have taken none of the usual steps for obtaining adjudication until they were stimulated to action by the owners of the cargo, who in June 1855 brought their claim into the High Court of Admiralty, claiming the cargo, and demanding restitution with costs and damages. At the same time they issued a monition requiring the captors to proceed to adjudication. The captors proceeded accordingly, and in that year, (and again in 1856, upon further proof,) the case was heard, but the judge condemned the cargo, adding that he should have experienced very great difficulty in coming to the conclusion that the claimants had proved their property in the cargo even if they were entitled to any *persona standi* in the court.

The following contains the chief points of the judgment delivered by the Lords of the Privy Council, on the appeal:—

Upon the appeal, the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

Upon the general principles of law, applicable to this subject, there can be no dispute. The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purpose of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control? or, is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of



quest is confirmed, or in any other way made complete, the allegiance of the inhabitants who remain in the conquered national character arises? It appears to their Lordships that the first proposition cannot be maintained.

With respect to the meaning of the term 'dominions of the enemy,' and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of the 'Fama' (5 Rob. 115) he lays it down that, in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. 'This,' he observes, 'is the general law of property, and applies, I conceive, no less to the "right of territory" than to other rights. Even in newly discovered countries when a title is meant to be established for the first time, some act of possession is usually done, and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public act, that all who are deeply interested in the event as the inhabitants of such settlements may be informed under whose dominion and under what law they are to live.'

The importance of this doctrine will appear when the facts with respect to the occupation of the Principalities come to be examined. That the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of the 'Dart' and 'Happy Couple,' when the rule operated with extreme hardship.

In the case of the 'Manilla' (1 Edw. 3) Lord Stowell gives the following account of those decisions:—

'Several parts of it [the island of St. Domingo] had been in the actual possession of insurgent negroes, who had detached them as far as actual occupancy could do from the mother country of France and its authority, and maintained within those parts, at least, an independent government of their own.

'And although this new power had not been directly and formally recognised by any express treaty, the British Government had shown a favourable disposition towards it, on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been declared or done by the British Government that could authorise a British tribunal to consider this island generally, or part of it (notwithstanding a power hostile to France had established itself within it, to that degree of force and with that kind of allowance from some other States) as being other than still a colony, or part of a colony, of the enemy. There can be no doubt that the strict principle of that decision was correct.'

On the other hand, when places in a friendly country have been seized by and are in possession of the enemy, the same doctrine has been held.

While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by the French troops, and, amongst others, the port of St. Andero.

A ship called the 'Santa Anna' was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed: 'Under

territory is transferred to the new sovereign. The same effect is produced by an ordinary cession of such territory. In

these public declarations of the State, establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under circumstances which would justify the confiscation of neutral property.' The same principle has been acted upon in the Courts of Common Law.

In the case of *Donaldson v. Thompson* (1. *Campb. N.P.R.* 429), the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a Republic was preserved, and it was contended that the islands must be considered as substantially part of the territory of the Russian Empire if the Russian power was there dominant, and the supreme authority was in the Russian commander; or, if not, that the Republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the islands as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on.

Both these propositions, however, were repudiated by Lord Ellenborough, and afterwards, on a motion to set aside the verdict, by the Court of King's Bench, Lord Ellenborough observed, 'Will anyone contend that a Government which is obliged to yield in any quarter to superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing.'

The same doctrine was afterwards laid down by the Court of King's Bench, in the case of *Hagedorn v. Bell* (1 *Maule & Sel.* 450), in the case of a trade carried on with Hamburg, which had been for several years, and at the time was, in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognised by Lord Stowell, in the case of the *'Boletta'*, (1 *Edw.* 171). A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian; that question depending upon the national character of Zante at the time of the capture.

Lord Stowell observes (p. 173) :—'On the part of the Crown it has been contended that the possession taken by the French was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession or by a long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature.'

'France and Russia had settled their differences by the peace of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia.'

On this ground he held the territory to have become French territory, remarking, in a subsequent passage of his judgment, that this was a cession by treaty, and not a hostile occupation by force of arms, liable to be lost the next day.

These authorities, with the other cases cited at the bar, seem to establish the proposition that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

From the nature of the possession of Moldavia by the Russians, at



either case the national character of the inhabitants who remain, is deemed to be changed from that of the former to the new sovereign, and in their relations with other nations they are entitled to all the advantages, and are subject to all the disadvantages, of their new international *status*.

§ 32. But mere cession by treaty does not of itself operate as an immediate transfer of the allegiance of the inhabitants of the ceded territory. They remain subjects of the power to which their allegiance was originally due, until the solemn delivery of the possession by the ceding State, and an assumption of the government by that to which the cession is made. The actual delivery of the possession, and the actual exercise of the powers of government must be clearly shown. In a case of capture of property belonging to a merchant of New Orleans, after the cession of Louisiana by Spain to France, which, if the owner was a French subject, was hostile, and, if a Spanish subject, was neutral, Sir William Scott decreed the restoration, on the ground that the evidence of any actual delivery of the territory to any French authority, was insufficient and unsatisfactory.<sup>1</sup>

the time when the shipment in question was made, it seems impossible to hold that, by means of an occupation so taken, so continued, and so terminated, Moldavia ever became part of the dominions of Russia, and its inhabitants subjects of Russia and, therefore, enemies of those with whom Russia was at war. The utmost to which the occupation could be held to amount was a temporary suspension of the *suzeraineté* of the Porte, and a temporary assumption of that *suzeraineté* by Russia; but the national character of the country remained unaltered, and any intention to alter it was disclaimed by Russia. At what period, then, could foreigners dwelling there be said to have that notice of a change in the dominion and in the laws under which they were to live, to which Lord Stowell refers in the case of the 'Fama'? At what period were they under the obligation of changing their domicile in it, under the penalty, if they omitted to do so, of being treated as enemies of Great Britain?

Moldavia and Wallachia were not treated by the Porte as enemies, and it would be singular if these countries, though not held to be enemies by Turkey, should be held to be enemies of the allies of Turkey. That the Wallachian flag was recognised, both by the Russian and Turkish authorities, sufficiently appears from the documents before the court; and their Lordships have ascertained, by communication with the Foreign Office, the other facts above stated; and, further, that no act was ever done by the British Government to change the national character of the Provinces in relation to Great Britain; and without some such act the occupation by the Russians, under the circumstances stated, could not produce such an effect. . . .

Being of opinion that the claimant had a *persona standi* in the Court, their Lordships considered the effect of the evidence upon further proof, and advised restitution of the cargo and damages against the captors. —The 'Gerasimo,' 11 Moore, P. C. R. 88.

<sup>1</sup> The 'Fama,' 5 Rob., 106.

§ 33. Revolution or possession by insurgents, as already stated, cannot be regarded by a prize court as changing the national character of the territory so possessed or occupied, until the fact has been recognised by the political authority of the government to which the court belongs. Thus, although it was a matter of notoriety that a considerable part of the island of St. Domingo had, by revolt, been detached from the French colonial government, and its inhabitants were in common opposition to France, then at war with England, the court of appeal, nevertheless, decided that such inhabitants must be regarded as hostile in their commercial relations, till the British Government should recognise their change of national character. But where any port or part of the island had been recognised by orders in council as not in the possession and under the dominion of France, such port or place would be so considered by the court. The supreme court of the United States has adopted the same rule of decision.<sup>1</sup>

§ 34. In many cases, the nature of the traffic or business in which an individual is engaged, may stamp upon him a national character, wholly independent of that which his place of residence alone would impose. Thus, although a neutral merchant, residing in his own country, and trading, in the ordinary manner, to the country of a belligerent, does not thereby acquire a hostile character, yet, if he is a privileged trader, engaged in a commerce that none but the subjects of the enemy are permitted to conduct, or that can only be carried on by a special license from the government, the place of his domicil will not protect such trade, but all his property embarked in it becomes liable to confiscation, as that of an enemy. So, also, if the neutral merchant has a house of trade in the hostile country, either as a partner, or on his sole account, all the commerce of such house is regarded as essentially hostile, and all his property engaged in it is liable to condemnation. The effect of the traffic in which a neutral vessel is engaged upon the national character of the owner, so far as such property is concerned, is fully discussed by Mr. Duer.<sup>2</sup>

<sup>1</sup> The 'Manilla,' 1 *Edw. R.*, 1; the 'Pelican,' 1 *Edw. R.*, app. D.; *Yrisarri v. Clement*, 3 *Bing. R.*, 432; *Johnson v. Greaves*, 2 *Taunt. R.*, 344; *Blackburne v. Thompson*, 3 *Comp. R.*, 61; *Hoyt v. Gelston*, 3 *Wheat. R.*, 324, note; *Kennett v. Chambers*, 14 *How. R.*, 38.

<sup>2</sup> Duer, *On Insurance*, vol. i. pp. 523-577.



§ 35. There is, however, a very material distinction between the hostile character impressed by domicile, and that which results solely from the nature of the traffic in which the individual is engaged. A foreign merchant domiciled in the country of the enemy, is himself an enemy, in the same sense and to the same extent as a native subject; and all his property on the ocean, wherever it may be found, and whatever may be the nature of the commerce in which it is embarked, is liable to confiscation. But the hostile character which arises solely from the nature of the traffic, is limited, in its noxious and penal effects, to the transactions and property that the prohibited trade embraces; in all other respects, such individual still retains all the rights and immunities of a neutral, a subject, or an ally, as the case may be.<sup>1</sup>

§ 36. The habitual employment of an individual may also affect his national character. Thus, a person employed habitually and constantly, as a master or mariner, or as a supercargo or commercial agent, in the trade and navigation of a hostile country, although he has no domicile there, in the civil and legal sense of the term, is impressed with its national character, and this hostile character spreads itself, in its consequences, *generally* over his affairs. It follows and involves all his property, in whatever trade employed, that does not appear, from other circumstances, to have acquired a distinct national character. In order to redeem it from confiscation on this ground, the burthen of proof is cast upon him. The principle seems founded in reason; for persons so employed are as much incorporated with the commerce of the hostile country, as persons who have their permanent residence in the enemy's territory.<sup>2</sup>

§ 37. The national character of ships is, as a general rule, determined by that of their owners. But, as hereafter shown, this rule is subject to many exceptions, a hostile character being not unfrequently impressed upon the vessel, while its owners are neutrals or friends. Thus, a hostile flag and pass,

<sup>1</sup> The 'Anna Catharina,' 4 *Rob.*, 119; the 'Freundschaft,' 4 *Wheat. R.*, 107; the 'San Jose Indiano,' 2 *Gallis. R.*, 268.

<sup>2</sup> In Captain Sherwin's case, the United States pleaded that his nationality was proved by his having commanded a United States' ship, which only United States' citizens could do.—*Parl. Papers*, No. 612, 1863.

It was decided in *Guier v. O'Daniel* (1 *Binn.* 349) that the domicile of a seafaring man, without a known domicile, is the domicile of origin. See also Foelix, *Droit Inter. Priv.* l. i. t. i. § 29.

the carrying of military persons or despatches of an enemy, trading between enemy's ports, etc., will give to the vessel a hostile character, no matter what may be that of its owners. The national character of goods, as a general rule, follows that of their owner, but, as shown in the subsequent chapters, this rule is sometimes varied by the character and conduct of the vessel in which they are found, by the acts of the commander or supercargo in whose hands they have been placed, and by the nature of the documentary evidence by which the ownership is attempted to be proved. The origin, nature and destination of the goods themselves are sometimes conclusive of their national character, whatever may be that of their proprietor. Thus, where the goods are the produce of an estate or plantation in an enemy's territory or colony, the soil impresses upon them a hostile character, although the owner may be a neutral, and resident in a neutral country. Although his general national character may be neutral or friendly, he is considered an enemy, with respect to that particular produce, which, therefore, in its course of transportation to another country, is liable to capture as enemy's property. The rule applies even where such produce has been shipped in time of peace. The other questions will be discussed in subsequent chapters.<sup>1</sup>

<sup>1</sup> Phillimore, *On Int. Law*, vol. iii, §§ 485, 487; the 'Phoenix,' 5 *Rob.*, 25; the 'Vigilantia,' 1 *Rob.* 13; *Bentzon v. Boyle*, 9 *Cranch. R.*, 191; the 'Herstelder,' 1 *Rob.*, 115; the 'Packet de Bilboa,' 2 *Rob.*, 133; see *post* vol. ii. ch. xxii. et seq. For the evidence of registry of a British ship, see 17 and 18 *Vict.*, c. 104, s. 107, and 39 and 40 *Vict.*, c. 80, ss. 36, 37. In cases of slave seizures the flag carried by the slave ship does not fix the nationality of the vessel.—The 'Eagle,' 1 *W. Rob.* 246.

The Treaty of Naturalisation between Great Britain and the United States, signed May 13th, 1870, includes (*inter alia*) the following articles:—

ARTICLE I. British subjects who have become, or shall become, and are naturalised according to law within the United States of America as citizens thereof, shall, subject to the provisions of Article II., be held by Great Britain to be in all respects and for all purposes citizens of the United States, and shall be treated as such by Great Britain.

Reciprocally, citizens of the United States of America who have become, or shall become, and are naturalised, according to law within the British dominions as British subjects, shall, subject to the provisions of Article II., be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States.

ARTICLE II. Such British subjects as aforesaid who have become, and are naturalised, as citizens within the United States, shall be at liberty to



renounce their naturalisation and to resume their British nationality, provided that such renunciation be publicly declared within two years after the twelfth day of May, 1870.

Such citizens of the United States as aforesaid, who have become and are naturalised, within the dominions of Her Britannic Majesty, as British subjects, shall be at liberty to renounce their naturalisation and to resume their nationality as citizens of the United States, provided that such renunciation be publicly declared within two years after the exchange of the ratifications of the present convention.

The manner in which this renunciation may be made and publicly declared shall be agreed upon by the Governments of the respective countries.

ARTICLE III. If any such British subject as aforesaid, naturalised in the United States, should renew his residence within the dominions of her Britannic Majesty, Her Majesty's Government may, on his own application and on such conditions as that Government may think fit to impose, readmit him to the character and privileges of a British subject, and the United States shall not in that case claim him as a citizen of the United States on account of his former naturalisation.

In the same manner, if any such citizen of the United States as aforesaid, naturalised within the dominions of Her Britannic Majesty, should renew his residence in the United States, the United States Government may, on his own application and on such conditions as that Government may think fit to impose, readmit him to the character and privileges of a citizen of the United States, and Great Britain shall not in that case claim him as a British subject on account of his former naturalisation.

The British Naturalisation Act, 1870 (33 Vict., c. 14), contains (*inter alia*) the following provisions:—

2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject, and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject: provided,—

(1) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise.

(2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him.

(3) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

3. Where Her Majesty has entered into a Convention with any foreign State to the effect that the subjects or citizens of that State, who have been naturalised as British subjects, may divest themselves of their status as such subjects, it shall be lawful for Her Majesty by Order in Council to declare that such Convention has been entered into by Her Majesty, and from and after the date of such order in council any person being originally a subject or citizen of the State referred to in such order, who has been naturalised as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration, such person

shall be regarded as an alien and as a subject of the State to which he originally belonged as aforesaid.

A declaration of alienage may be made as follows : that is to say, if the declarant be in the United Kingdom, in the presence of any justice of the peace ; if elsewhere in Her Majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law, in the place in which the declarant is, to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

4. Any person, who by reason of his having been born within the dominions of Her Majesty, is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject.

6. Any British subject who has at any time before, or may at any time after, the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall, from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien : provided :—

(1) That where any British subject has before the passing of this Act voluntarily become naturalised in a foreign State, and yet is desirous of remaining a British subject, he may at any time, within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration hereinafter referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject ; with this qualification, that he shall not, when within the limits of the foreign State in which he has been naturalised, be deemed to be a British subject, unless he has ceased to be a subject of that State, in pursuance of the laws thereof, or in pursuance of a treaty to that effect :

(2) A declaration of British nationality may be made, and the oath of allegiance be taken, as follows ; that is to say—if the declarant be in the United Kingdom, in the presence of a justice of the peace ; if elsewhere in Her Majesty's dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is to administer an oath for any judicial or other legal purposes. If out of Her Majesty's dominions, in the presence of any officer in the diplomatic or consular service of Her Majesty.

7. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of Her Majesty's principal secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends when naturalised either to reside in the United



Kingdom, or to serve under the Crown, may apply to one of Her Majesty's principal secretaries of State, for a certificate of naturalisation. The applicant shall adduce in support of his application such evidence of his residence or service, and intention either to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may with or without assigning any reason give or withhold a certificate, as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalisation is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that same State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

The said Secretary of State may in manner aforesaid grant a special certificate of naturalisation to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

An alien who has been naturalised previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalisation under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same terms and subject to the same conditions in and upon which such certificates might have been granted if such alien had not been previously naturalised in the United Kingdom.

10. The following enactments shall be made with respect to the national status of women and children :—

(1) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject ;

(2) A widow, being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this act :

(3) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalised, and has, according to the laws of such country, become naturalised therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject :

(4) Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents :

(5) Where the father, or the mother being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalised British subject.

14. Nothing in this act contained shall qualify an alien to be the owner of a British ship.

The 35 and 36 Vict. c. 39 amends the 33 Vict. c. 14, and also renders valid any renunciation made in manner provided by the supplementary Convention between Great Britain and the United States, of Feb. 23, 1871, of which the two principal articles are as follows:—

Art. I. Any person being originally a citizen of the United States, who had previously to May 13, 1870, been naturalised as a British subject, may, at any time before August 10, 1872, and any British subject who, at the date aforesaid had been naturalised as a citizen within the United States, may, at any time before May 12, 1872, publicly declare his renunciation of such naturalisation, by subscribing an instrument in writing, substantially in the form hereunto appended, and designated as Annex A.

Such renunciation by an original citizen of the United States of British nationality shall, within the territories and jurisdiction of the United States, be made in duplicate in the presence of any court authorised by law for the time being to admit aliens to naturalisation, or before the clerk or prothonotary of any such court; if the declaration be beyond the territories of the United States, it shall be made in duplicate before any diplomatic or consular officer of the United States. One of such duplicates shall remain on record in the custody of the court or officer in whose presence it was made; the other shall be, without delay, transmitted to the department of State.

Such renunciation, if declared by an original British subject of his acquired nationality as a citizen of the United States, shall, if the declarant be in the United Kingdom of Great Britain and Ireland, be made in duplicate, in the presence of a justice of the peace; if elsewhere in Her Britannic Majesty's dominions, in triplicate, in the presence of any judge of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law, in the place in which the declarant is to administer an oath for any judicial or other legal purpose; If out of Her Majesty's dominions, in triplicate, in the presence of any officer in the diplomatic or consular service of Her Majesty.

Art. II. The contracting parties hereby engage to communicate each to the other from time to time, lists of the persons who, within their respective dominions and territories, or before their diplomatic and consular officer, have declared their renunciation of naturalisation, with the dates and places of making such declarations, and such information as to the abode of the declarants, and the times and the places of their naturalisation, as they may have furnished.

The following is a recent example of the loss of nationality of a ship of war. On the evening of May 6, 1877, the crew of a Peruvian ship of war, the 'Huascar,' anchored in the bay of Callao, revolted, and declared in favour of Don Nicolas Pierola. The captain and most of the officers were on shore at the time, and those who remained on board headed the mutiny. Several naval officers, both from the shore and other men-of-war took part in the movement, which was also aided by some civilians friends to the cause of Señor Pierola. The vessel was immediately got under weigh without any attempt apparently being made to detain her by the other men-of-war anchored near her, and she eventually got clear of the bay, and proceeded towards the south. Two days afterwards the following decree was issued by the President of the Republic:—

'Art. 1. Let the proper procedure be commenced against the authors and their accomplices who committed the crimes that took place on board the monitor "Huascar" on the night of the 6th instant.

'Art. 2. The Government declare that the Republic is not responsible for the acts of the rebels of whatsoever nature they may be.



'Art. 3. The Government authorise the capture of the "Huascar," and offer to recompense properly all those who, not belonging to the crews of the vessels forming the squadron of operation, shall bring her under the authority of the Government, or who may contribute to do so.'

In the meantime the 'Huascar' proceeded to Mollendo, where she boarded a British steamer, and demanded the official correspondence, which was refused; whereupon the officer of the 'Huascar' stated that he did not like to use force, as Señor Pierola was not yet on board, but that they soon expected orders to seize the mails when they thought proper to do so. A few days later the 'Huascar' stopped the British mail steamer from Liverpool, on the high seas, by firing a blank cartridge. On this occasion also the officers who boarded the steamer demanded the official correspondence, which was refused, and they retired without resorting to violence. Afterwards she stopped another British steamer, and took out of her by force Colonels Varela and Espinosa, two Government officials, who were passengers, and who were going to Iquique on the Government service. Finally, Rear-Admiral de Horsey, the British Commander-in-Chief, received a telegram from Her Majesty's Consul at Arica, informing him that the 'Huascar' had taken seven lighters of coals from an English vessel, without making any arrangements as to payment. Under these circumstances the Admiral considered it his duty, in view of the Peruvian Government decree declaring that the Republic was not responsible for the actions of that vessel, to seize the 'Huascar,' in order to put a stop to her proceedings against British interests; and he consequently proceeded to sea in H.M.S. 'Shah' for that purpose. The 'Huascar' having refused to obey his summons, the Admiral engaged her in Peruvian waters, off the town of Pacocha, and he also sent a torpedo expedition to blow her up; this failed, owing to the 'Huascar' having got away under cover of the night. After her engagement with, and escape from, the 'Shah,' she appeared off Iquique with a flag of truce flying. The Peruvian squadron went out to meet her, and communication was established. After much parleying the 'Huascar' surrendered, first making terms that everyone on board that ship, except Pierola himself, should be set at liberty. The Peruvian Republic complained to the British Government of the conduct of Rear-Admiral de Horsey, alleging that the 'Huascar' did not, on account of having refused to recognise the authority of the Government of Peru, cease to belong to Peru; and that although the supreme decree of May 8 was issued to bring about the apprehension of the 'Huascar,' foreign ships of war were not thereby entitled to attack her, not only because International Law prohibited mixing in the internal affairs of other States, but also because the reward offered by the decree could not refer to the commanders of such ships without grossly offending their personal and national dignity. The British Government having required the opinion of its Law Officers on the subject, the latter reported that in their opinion the papers submitted to them showed that the 'Huascar' had been taken out of the hands of her lawful officers; that the Peruvian Government had disavowed any liability for her acts; that she was consequently sailing under no *national* flag; and that no redress could be obtained for any acts which she might commit. Therefore, they were of opinion that in this state of things Admiral de Horsey was bound to act decisively for the protection of British subjects and property, and that the proceedings resorted to by him were in law justifiable. Lord Derby approved of the Admiral putting a stop to the lawless proceedings of the 'Huascar,' but at the same time expressed regret that he had not in the first instance endeavoured to obtain redress by means of remonstrance.—See *Parl. Papers* 1877.

On the question being brought before the House of Commons, the Attorney-General expressed his opinion that the 'Huascar' was not a

belligerent, but a rover committing depredations which made her an enemy of Her Britannic Majesty ; and, therefore, it could not be disputed that the Admiral could wage war upon her. If she were a belligerent, or the vessel of a belligerent Power, to which the representative of the British Government was under an obligation to extend belligerent rights, the proceedings of the Admiral might be open to censure. But to make out that she was a vessel belonging to a belligerent power, there must be a rebellion ; the rebels also, must have established something like a Government, to do certain acts upon the high seas against neutral ships. If a cruiser did commit acts of depredation without authority, the neutral States would demand satisfaction. If the 'Huascar' were a belligerent, she would be responsible. In strictness the crew of the 'Huascar' were pirates, and might have been treated as such ; but it was one thing to say that, according to the strict letter of the law, people have been guilty of acts of piracy, and another to advise that they should be tried for their lives and hanged at Newgate. The 'Huascar' was called upon to surrender, and she refused. The Admiral took steps accordingly to make her surrender.—*H. of C. Debates*, 1877.



## CHAPTER XIII.

## MUTUAL DUTIES OF STATES.

1. All international rights have their corresponding duties—2. Classification of the duties of States—3. Duties corresponding to perfect rights—4. State responsible for acts of its rulers—5. Acts of subordinate officers—6. Acts of private citizens—7. If such acts be ratified—8. General conduct of citizens—9. Pretended emigration and expatriation—10. Duties of mutual respect—11. Failure in respect not always an insult—12. Right to trade—13. Mutual duty of commerce—14. Declining commercial intercourse—15. Total prohibition of China and Japan—16. Imperfect duties—17. Duty of mutual assistance—18. In case of famine—19. In case of floods, fires, etc.—20. For the preservation of others—21. Duties of humanity—22. Offices of humanity may be asked but not required—23. Each one to determine whether it will grant them—24. Rule and measure of such offices—25. Duty of international friendship.

§ 1. HAVING discussed the general rights of sovereign and independent States, with respect to their relations with each other, it is proposed here to consider briefly the duties resulting from, or corresponding to, such rights. Every right has its correlative duty. As the international rights of States are divided into *perfect* and *imperfect rights*, so the corresponding international obligations may be also divided into *perfect* and *imperfect duties*. It will be remembered that any right of a sovereign State is none the less a right because it is classed as imperfect in international jurisprudence, or because it cannot be absolutely demanded and enforced under the positive law of nations; so, the corresponding obligation, although imperfect, is, nevertheless, a duty binding upon the conscience of the nation which owes it. Some writers have objected to the use of the terms *imperfect rights* and *imperfect duties*, considering all rights as *perfect*, or *stricti juris*, and their corresponding duties as *absolute*; while what Vattel calls imperfect rights and duties, are classed as usages of comity,—*comitas gentium*,—or laws of convenience,—*droit de convenance*. The distinctions made by Vattel are well founded, and his terms, although perhaps not well chosen, are now thoroughly incorporated into

the technical vocabulary of international science, and their meaning is well understood.<sup>1</sup>

§ 2. In discussing the mutual duties of States, we will consider: *First*, those *perfect* duties which one State is absolutely bound to perform, and which others have a perfect right to demand, such as the obligations to render justice to others, and to permit to them the enjoyment of the rights of independence, of quality, of property, of legislation and jurisdiction, of legation and treaty, etc.; *second*, those *imperfect* duties which are recognised by international jurisprudence as binding obligations, but which those to whom they are due cannot claim and enforce as absolute rights, such as the ordinary duties of comity, of diplomatic and commercial intercourse, etc.; and *third*, those *imperfect* duties which rest solely upon the law of nature, and are not taken cognisance of by the positive law of nations, such as the offices of humanity, of friendships, of reciprocal kindness, etc.

§ 3. The obligation of a State to render justice to all others is a *perfect* obligation, of strictly binding force, at all times and under all circumstances. No State can relieve itself from this obligation, under any pretext whatever. It is an obligation, according to Vattel, 'more necessary still between nations than between individuals; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress.' The same rule applies to all the duties of a State which result from the *perfect* international rights of others, for whatever one nation has a perfect right to demand of another, that other is absolutely bound to render. The rule is absolute, and cannot be evaded under any technicality, sophistry, or other pretext. Whatever one State can claim as its perfect right, it is the absolute duty of every other to concede. To refuse it, under whatsoever pretext, would be a violation of the positive rule and fundamental principle of international jurisprudence. And no civilised nation can now be found to refuse to another an acknowledged and indisputable right. They may dispute the right itself, and deny its existence as a right, but there are none so low and debased in moral character as to deny their duty and obligation to respect the manifest and acknowledged international rights of others. Moreover, this obligation of

<sup>1</sup> Vattel, *Droit des Gens*, prelim.



the State is equally binding upon all its rulers, officers, and citizens,—in fine, upon each and every individual member which composes the State or body politic.<sup>1</sup>

§ 4. The question here arises, how far a State is responsible for the acts of its rulers, officers, and private citizens, or, in other words, what are to be considered as the acts of the State, and what as the acts of individuals. There can be no doubt with respect to its responsibility for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the government, so far as the acts are done in their official capacity. States have relations with each other only through their respective governments, and, in international jurisprudence, the government is the State, no matter what may be its form or duration, whether it be a despotism, or a pure republic; whether it be a mere *de facto* government, organised for a temporary purpose, or one deriving its authority from long ages of legitimate descent.<sup>2</sup>

§ 5. The question, however, assumes a different aspect when we consider the acts of the subordinate officers of a State. A State is undoubtedly responsible for *all* the acts of its ambassadors and other public ministers furnished with *full power*, and also of all its diplomatic agents, within the limits of their presumed powers and duties, until such acts are ex-

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. v. § 63.

<sup>2</sup> In the case of the Cherokee Nation *v.* State of Georgia (5 *Peters*, 1), it was held by the Supreme Court that the Cherokee nation of Indians, dwelling within the jurisdictional limits of the United States, was not a foreign State in the sense in which the term is used by the Constitution, nor entitled as such to proceed in that court against the State of Georgia, but it was admitted that the Cherokees formed a State or distinct political society, capable of managing its own affairs and governing itself. The numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war. They were domestic dependent nations; their relation to the United States was peculiar, and resembled that of a ward to his guardian, and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession.

In the case of Worcester *v.* State of Georgia (6 *Peters*, 515), the Supreme Court declared that the right given by European discovery was the exclusive right to purchase; but this right was not founded on a denial of the right of the Indian possessor to sell. The Cherokee nation was a distinct community, occupying its own territory with boundaries, accurately described, in which the laws of Georgia could not rightfully have any force, and into which the citizens of Georgia had no right to enter but with the assent of the Cherokees themselves, or in conformity with Treaties, and with Acts of Congress.

pressly disclaimed by the State as being unauthorised. And even then it is bound, in general, to repair the wrong and to punish the offender; for a mere disclaimer is not always satisfactory to the party aggrieved. This rule is particularly applicable to the acts of its military and naval forces. These are regarded as the peculiar guardians of the honour and dignity of the State as represented by the flag under which they serve; moreover, the rigour of military law and military discipline would, by presumption, give to the act of a military officer a much higher degree of authority and responsibility than the act of a mere civil functionary. The former are under the immediate orders and direction of the head of the State, while the latter, though supposed to be governed by the laws of the State, are not always subject to the immediate direction of its executive government, or amenable to punishment. The act of a military or naval officer, in his official capacity, is, therefore, *primâ facie* the act of his government, and is to be so regarded till disavowed by his government. The officer's commission is, in general, to be regarded as sufficient evidence of his authority. If the act of the officer be disavowed by his government, the latter is bound to punish him, or to surrender him for punishment by the injured party.<sup>1</sup>

§ 6. Vattel discusses, at considerable length, the question, how far the sovereign or State is responsible to another for the acts of private citizens or subjects. 'Whoever,' he says, 'offends the State, injures its rights, disturbs its tranquillity, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished for it. Whoever uses a citizen ill, indirectly offends the State, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and, if possible, oblige him to make entire satisfaction; since, otherwise, the citizen would not obtain the great end of the civil association, which is safety. On the other hand, the nation, or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another State, much less to offend the State itself. And that, not only because no sovereign ought to permit those who are under his command to violate the precepts

<sup>1</sup> Leibner, *Political Ethics*, b. vii. § 26; De Felice, *Droit de la Nat. etc.*, tome ii. lec. xv. See *post*, ch. xiv. § 19.



of the law of nature, but, also, because nations ought mutually to respect each other, to abstain from all offence, from all injury, and, in a word, from everything that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation than if he injured them himself. In short, the safety of the State, and that of human society, requires this attention from every sovereign.' Again, 'as it is impossible for the best regulated State, or for the most vigilant and absolute sovereign, to model, at his pleasure, all the actions of his subjects, and to confine them, on every occasion, to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens. We ought not then to say, in general, that we have received an injury from a nation, because we have received it from one of its members.' The act of the individual is not necessarily and of consequence the act of the State, nor would it be just, in all cases, to hold a State responsible for the act of each individual member of which it is composed. The responsibility of the State results from its neglect or inability to control the conduct of its subjects, or its neglect or inability to punish the offences and crimes which they commit.<sup>1</sup>

§ 7. But, says the same author, if a nation, or its ruler, approves and ratifies the act committed by a citizen, it makes that act its own; the offence must then be attributed to the nation as the true author of the injury, of which the citizen is, perhaps, only the instrument. So, also, the sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself, in some measure, an accomplice in the injury, and becomes responsible for it. If a nation should refuse or fail to pass the laws necessary to restrain its citizens from aggressions upon other States, or upon their citizens, or if, such laws being enacted, the officers of the State neglect to enforce them, and such aggressions by individuals result therefrom, the State is unquestionably responsible for the injury.

§ 8. 'There is another case,' he continues, 'where the

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. vi. § 71; Phillimore, *On Int. Law*, vol. i. § 218; Rutherford, *Institutes*, b. ii. ch. ix. § 12.

nation in general is guilty of the base attempt of its members. That is when, by its manners, or the maxims of its government, it accustoms and authorises its citizens to plunder and ill-use foreigners, or to make inroads into neighbouring countries, etc. Thus, the nation of the Usbecks is guilty of the robberies committed by the individuals of which it is composed. The princes, whose subjects are robbed and massacred, and whose lands are infested by these robbers, may justly punish the entire nation. What do I say?—all nations have a right to enter into a league against such a people, to repress them, and to treat them as the common enemies of the human race.' So, with respect to Algiers, and the States of the Mediterranean, from whose ports issued numerous corsairs to prey upon the commerce of other nations; who would say that the whole State was not justly punishable for these acts of its subjects? or who would think of applying to them the doctrine that the individual alone was responsible? There are, in modern times, and among Christian States, Usbecks and Algerines, in practice, if not in principle. If a State should neglect to enact the requisite laws to restrain its subjects and citizens from repeated and systematic aggressions upon the rights of others, or to enforce such laws when enacted, it not only exposes itself to the just hostilities of the parties aggrieved, but virtually becomes an outlaw from the society of nations, and, by the well-established principles of international jurisprudence, is liable to be attacked and punished by all, as the universal enemy of mankind. Systematic and organised aggressions upon the rights of independent States, and robbery and plunder upon land, by whatsoever name they may be called, or under whatsoever pretext they may be carried on, are as objectionable in their character, and as dangerous in their tendency, as piracy on the high seas. Piracy, under the law of nations, by whomsoever or wheresoever committed, may be tried and punished in the courts of justice of any nation, inasmuch as all nations have an equal interest in the apprehension and punishment of such offences against international law.<sup>1</sup> And it has been contended by

<sup>1</sup> Piracy is a robbery committed upon the sea, and a pirate is a sea thief. Indeed, the word 'pirata,' as it is derived from *περᾶν*, 'transire, a transeundo mare,' was anciently taken in a good and honourable sense, and signified a maritime knight and an admiral or commander at sea, as appears by the several testimonies and records cited to that purpose,



some, that the same principle is applicable to similar crimes committed on land, and that those who, without the authority

by that learned antiquary, Sir Henry Spelman, in his *Glossarium*. And out of him the same sense of the word is remarked by Dr. Cowell, in his *Interpreter*, and by Blount in his *Law Dictionary*. But afterwards the word was taken in an ill sense, and signified a sea rover or robber, either from the Greek word *πείρα*, *deceptio, dolus* 'deceit,' or from the word *πειράω*, 'transire,' of their wandering up and down and resting in no place, but 'coasting hither and thither to do mischief;' and from this sense, *οἱ κατὰ θάλασσαν κακοῦργοι*, sea malefactors were called *πειραταί*, pirates.—Per Trott J. Vice-admiralty, trial of Bonnet, XV., *State Trials*, 1231.

'I apprehend,' said Dr. Lushington, 'that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas. I do not believe that even where human life was at stake, our courts of common law ever thought it necessary to extend their enquiry further, if it was clearly proved against the accused that they had committed robbery and murder on the high seas. In that case they were adjudged to be pirates and suffered accordingly. Whatever may have been the definition in some of the books, it was never, so far as I am able to find, deemed necessary to enquire whether parties so convicted of these crimes had intended to rob on the high seas or to murder upon the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts, such as those I have mentioned, when committed on the high seas, are piratical acts, and contrary to the laws of nations. Subjects of one country may rebel, but it does not follow that, because rebels and insurgents may commit against the ruling powers of their own country acts of violence, they may not be pirates also, or that they may not commit piratical acts against the subjects of other States, especially if such acts were in no degree connected with the insurrection or rebellion. Even an independent State may be guilty of piratical acts. What were the Barbary pirates? What are the African tribes? I am well aware that it has been said that a State cannot be piratical, but I am not disposed to assent to such *dictum* as a universal proposition.'—The Magellan Pirates, Spink's *Adm. R.* 83. See *United States v. Smith*, 5 *Wheat.* 153.

'The next sort of offences,' said Sir Leoline Jenkins, 'pointed out in the Statute are robberies; and a robbery, when it is committed upon the sea, is what we call *piracy*. A robbery, when it is committed upon the land, does imply three things:—1, That there be a violent assault; 2, that a man's goods be actually taken from his person or possession; 3, that he who is dispossessed be put in fear thereby.

'When this is done upon the sea, when one or more persons enter on board a ship with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession, and are put in fright by the assault, this is *piracy*; and he that does so is a *pirate* or a *robber* within the Statute. Nor does it differ the case though the party so assaulted and despoiled should be a foreigner, not born within the King's allegiance; if he be *de amicitia Regis* he is *eo nomine* under the King's protection, and to rob such a one upon the seas is *piracy*.

'Nor will it be any defence to a man, who takes away by force another's ship or goods at sea, that he hath a commission of war from some foreign prince, unless the person he takes from be a lawful enemy to that prince. . . . For there may be accessories in this (piracy) as well as other felonies, and they are punishable here; *piracy* being now made

or commission of any State, and in defiance of all law, organise and band together for predatory and illegal military expeditions, are equally punishable, under the law of nations, in the courts of any State having custody of the offenders. However this may be, and whether or not such individual offenders are justiciable in the same manner as pirates, there can be no question of the guilt and responsibility of a government which encourages or permits its private citizens to organise and engage in such predatory and unlawful expeditions, against a State with which that government is at peace. Nor does it matter much what may be the ostensible or intended object of such unauthorised expeditions; whether it be to

*felony* by a Statute law, and when any offence is felony, either at the common law or by statute, all accessories, both before and after, are incidentally included.—Admiralty Sessions, Old Bailey. *Life of Sir L. Jenkins*, i. 94.

Piracy is punishable in British Courts by virtue of the 7 Will. IV. and 1 Vict. c. 88, s. 2, which provides that whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of, or belonging to, such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act whereby the life of such person may be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. And by s. 3, whosoever shall be convicted of any offence, which, by the 28 Hen. VIII. c. 15, 11 and 12 Will. III. c. 7; 4 Geo. I. c. 11; 8 Geo. I. c. 24; or 18 Geo. II. c. 30, amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be sent to penal servitude for life, or for not less than fifteen years (20 and 21 Vict. c. 3, s. 2), or to be imprisoned for two years (9 and 10 Vict. c. 24, s. 1).—See *R. v. Jones*, 11 Cox. 390; *R. v. Zulueta* 1 C. and K., 215; *R. v. Sawyer*, *R. and R.* 294.

Authorities seem to agree that a ship of a neutral commissioned by a belligerent is not a pirate.

It is an open question whether privateers, commissioned by a deposed sovereign, are pirates or not. For arguments on the subject, see 'An Essay concerning the Laws of Nations and the Rights of Sovereigns,' by Matthew Tyndal, LL.D., London, 1734. This work is quoted at some length by Sir R. Phillimore (*Int. Law*, i. 362), who inclines to the opinion that such ships are pirates.—See also *post*, p. 388.

If a ship were attacked by pirates, and her master became a slave to the captors, for the purpose of redeeming her, the ship and lading were, by the Maritime Law, tacitly presumed to be bound for his redemption by a general contribution. But not so, if the master had through his own folly suffered the ship to be taken.

The Civil Law, which used in England to govern the case of pirates, did not recognise any wrong in promising a ransom to a pirate and afterwards not complying with it; for the Law of Arms is not enjoyed by pirates, nor are they enemies in the true sense of the word, and, therefore, they do not enjoy the privileges of such. Notwithstanding this, a pirate may, by the Civil Law, demand justice in the Courts of Law for wrongs done to him (*Bodin*, l. i. c. 1). All ransom, whether to pirate or to enemy, is forbidden by the British Prize Act, 1865.



overthrow a despotism, or repress anarchy, and to establish a liberal government in their place, or to destroy a liberal government, and to establish a despotism, or produce general anarchy, the offence, in international law, is the same. In either case it is a violation of the international rights of others, and the State which permits its citizens or subjects to commit the offence, or neglects to punish them for it, is responsible for their acts.<sup>1</sup>

§ 9. Attempts have sometimes been made to excuse the State, or to exempt it from responsibility, for the acts of its citizens who engage in such unauthorised and illegal military expeditions, or who organise, or assist in organising, 'filibuster' expeditions against other nations, on the ground that such citizens are, by the very act of emigration, virtually *expatriated*, and can no longer be regarded as subjects whose conduct the State can control, or for whose acts it can be held responsible. The right of voluntary expatriation in time of peace is considered in another place; it is sufficient for the present discussion to remark that, even admitting this right to the fullest extent which has been claimed by the courts and jurists of the United States, all agree that it can never be pleaded in justification of an offence against law, public or municipal, which was committed or contemplated in the act of pretended emigration. If individuals were allowed to escape punishment for engaging in illegal enterprises, on the ground of expatriation by pretended emigration, the same excuse could be appealed to to cover treason, desertion, and other crimes, and to avoid the performance of local contracts. And if individuals cannot escape responsibility to their own government, for any unlawful act contemplated at the time of emigration, which they may do, it clearly follows that the State cannot escape moral or legal responsibility for the unlawful acts of its citizens, under the plea of their implied expatriation by pretended emigration. Emigration for an unlawful purpose is, in itself, an unlawful act, and may be prohibited by the State; and if such contemplated emigration of its citizens is intended to infringe the rights of a friendly nation, it is undoubtedly the duty of the State to exercise its right of prohibition and power of prevention. It cannot escape the responsibility of neglecting that duty, under the

<sup>1</sup> Vattel, *suprà*.

miserable pretext of the voluntary emigration, and consequent expatriation, of its citizens.<sup>1</sup>

§ 10. It is the duty of every State to show all proper respect and honour to other sovereign States, whether the dignity of such States be represented in the person of their sovereign, their flag, their ministers, or their subordinate officers. A want of respect to a subordinate officer, however, is not, by any means, to be necessarily construed into a want of respect for the State to which he belongs, for such officers do not, necessarily, nor even by implication, represent the dignity of their State or nation. To be wanting in respect to the representatives and officers of other States is a mark of ill-will, and such conduct is equally contrary to sound policy, and to what nations owe to each other. This most blamable and criminal disposition of States to imagine themselves insulted, where really no disrespect is intended, is thus forcibly described by Dymond: 'The wars that are waged for *insults to flags*, and an endless train of similar motives, are perhaps generally attributable to the irritability of our pride. We are at no pains to appear pacific toward the offender, our remonstrance is a threat, and the nation which would give satisfaction to an *inquiry*, will give no other answer to a menace than a menace in return. At length we begin to fight, not because we are aggrieved, but because we are angry. One example may be offered. In 1789, a small Spanish vessel committed some violence in Nootka Sound, under the pretence that the country belonged to Spain. This appears to have been the principal ground of offence, and, with this, both the government and people of England were very angry. The irritability and haughtiness which they manifested were unaccountable to the Spaniards, and the peremptory tone was imputed by Spain, not to the feelings of offended dignity and violated justice, but to some lurking enmity and some secret designs which

<sup>1</sup> Kent, *Com. on Am. Law*, vol. ii. p. 49; Cushing, *Opinions U. S. Attys Genl.*, vol. viii. p. 139; Jefferson, *Am. State Papers, Foreign Relations*, vol. i. p. 168; Murry *v.* the 'Charming Betsey,' 2 *Cranch. R.*, 64; De Felice, *Droit de la Nat., etc.*, tome ii. lec. 15.

The 5 Geo. I. c. 27 and other statutes prohibited certain workmen from leaving England. These were repealed by the 5 Geo. IV. c. 97. See also *Flack v. Holm*, 1 *Jac. and Walk. R.*, 405.

The 'Droit de Renvoi' is the right possessed by every State to expel foreigners from its territory. However, it is seldom exercised.—*And in* vol. ii. p. 97.



we did not choose to avow. If the tone had been less peremptory, and more rational, no such suspicion would have been excited, and the hostility which was consequent upon the suspicion would, of course, have been avoided. Happily, the English were not so passionate but that, before they proceeded to fight, they negotiated and settled the affair amicably. The *preparations* for this foolish war cost, however, three millions one hundred and thirty-three thousand pounds.<sup>1</sup>

§ 11. But to fail in matters merely ceremonial, by not rendering the respect and honour which usage and custom have established as properly due to others, is not necessarily an insult to the dignity of a State or of its sovereign. 'It is proper,' says Vattel, 'to distinguish between negligence or the omission of what ought to be done according to commonly received custom, and positive acts of disrespect and insult. The prince may complain of negligence, and, if it is not repaired, may consider it as a mark of a bad disposition; he has a right to demand, even by force of arms, the reparation of an insult. The czar, Peter I., complained in his manifesto against Sweden, of their not having fired the cannon on his passage to Riga. He might think it strange that they did not pay him this mark of respect, and he might complain of it; but to make this the cause of a war, was being extremely

<sup>1</sup> Dymond, *Essays on the Prin. of Morality*, essay iii. ch. xix.

This statement is not accurate. Two British vessels were captured off Nootka Sound, situated in the 50th degree to the north of California, by two Spanish *ships of war*; the cargoes of the British vessels were seized, and their officers and crews sent as prisoners to St. Blas, a Spanish port. This was done by Spain in support of a claim that all the coast to the north of Western America, on the side of the South Sea as far as beyond Prince William's Sound, in the 61st degree, belonged to her. The crew of these vessels had landed and built on the coast. The Viceroy of Mexico restored the vessels; but Great Britain could not suffer so important a question to remain in abeyance. After prolonged negotiations, it was finally settled by a Convention between Great Britain and Spain, Oct. 28, 1790, that the buildings and tracts of land in the use of the two captured vessels should be restored to them; that reparation should be made for all violence committed by the subjects of either nation; that British subjects should not navigate in the Pacific Ocean or South Seas within ten leagues of any coast occupied by Spain; that there should be free trade for both nations in all parts of the north-western coasts, or islands adjacent, to the north of the coast occupied by Spain, where the subjects of either Power might hold settlements; no settlements to be formed in such parts of the eastern and western coasts of South America or islands as were situated to the south of the same, which were occupied by Spain, but the respective subjects were to be at liberty to land and build temporary huts for the purpose of fishery.

prodigal of human blood.' The subject of military and maritime ceremonial, as connected with international etiquette and intercourse, has already been discussed in the chapter on the rights of equality.<sup>1</sup>

§ 12. Vattel lays down the general rule that 'every nation, in virtue of its natural liberty, has a right to trade with those which shall be willing to correspond with such intentions, and to molest it in the exercise of its right, is an injury.'<sup>2</sup> The

<sup>1</sup> *Ante*, p. 107 et seq.

<sup>2</sup> But there is one great exception to the rule thus laid down by Vattel, and that is the trade in slaves. Since the beginning of this century Great Britain had introduced into several treaties which she concluded stipulations in favour of the abolition of this traffic, but it was not until the Treaty of Paris, May 30, 1814, that the philanthropic principles which she desired to cause to enter into the policy of the various Great Powers took a tangible form.

At the Congress of Vienna 1815, of Aix-la-Chapelle 1818, and Verona 1822, the Powers therein assembled practically adopted the principle of abolition. The Treaty of London ratified February 19, 1842, contains similar principles.

It has, however, been questioned whether, in the interest of the American colonies, it might not have been sufficient and wiser for the Powers to have limited themselves to regulating the traffic, correcting its inhumanity, and ameliorating the condition of the slaves.

Great Britain abolished slavery in her colonies by the 3 and 4 Will. IV. c. 73, in 1833, but, however philanthropic and humane a measure in the abstract, it was a practical failure; for, while it reduced many British colonists to absolute beggary, it largely stimulated the foreign plantations and the foreign slave trade.

Slavery was abolished in the United States in 1865. Notwithstanding the abolition of slavery by Great Britain and by the United States, it has been held in the courts of both countries that the slave trade is not against the Law of Nations, although it is against the municipal laws of their own and other countries. Moreover, the same courts hold that the slave trade is not piracy, except where made so by the laws of individual nations, and then only as far as regards the subjects of that nation.—*English Cases*, the 'Louis,' 2 *Dods*, 210; *Madrigo v. Willes*, 3 *Baru. and Ald.*, 353; *Buron v. Denman*, 2 *Exch.*, 167; *Santos v. Illidge*, 28 *L.J.*, *C.P.*, 317, and in error 29 *L.J.*, *Exch. Ch.*, 348. *American Cases*, 'La Jeune Eugénie,' 2 *Mason*, 419, overruled by 'The Antelope,' 10 *Wheat.*, 66; see also *post*, vol. ii. p.

The following is a list of the principal treaties for the suppression of the traffic in negro slaves, made between Great Britain and the following States:—

1810. February 19, Portugal.

1814. January 14, Denmark; May 30, France; August 28, Spain.

1815. January 22, Portugal; February 8, Declaration of the Congress of Vienna.

1817. July 28, Portugal; September 23, Spain; November 23, Madagascar.

1818. May 4, Netherlands.

1820. October 11, Madagascar (additional).

1822. November 28, Declaration signed at the Congress of Verona; December 10, Treaty with Spain (supplementary article to the treaty of



Portuguese, at the time of their great power in the East Indies, were for excluding all other European nations from any commerce with the Indians; but a pretension, no less iniquitous than chimerical, was made a jest of, and the nations agreed to look on any acts of violence in support of it as just causes of

September 23, 1817); December 31, the Netherlands (additional article to the treaty of May 4, 1818).

1823. January 25, the Netherlands; May 31, Madagascar (additional).

1824. November 6, Sweden and Norway.

1825. February, Buenos Ayres or Rio de la Plata; February 26, Sweden and Norway; April 18, Columbia (since divided into three Republics, New Granada, Ecuador, and Venezuela).

1826. October 2, Portugal; November 23, Brazil; December 26, Mexico.

1831. November 30, France.

1833. March 22, France.

1834. July 26, Denmark (the accession to the conventions of 1831 and 1833); August 8, Sardinia (ditto); December 8, Ditto (additional article to the treaty of August 8).

1835. June 15, Sweden and Norway; June 28, Spain.

1837. February 7, the Netherlands; June 5, the Confederation of Peru; Bolivia; June 9, the Hanseatic Towns (accession to the convention of 1831 and 1833); November 24, Tuscany (ditto).

1838. February 14, Two Sicilies (ditto).

1839. January 19, Treaty with Chili; March 15, Uruguay; March 15, Venezuela; May 24, Argentine; July 13, Uruguay (ratified January 21, 1842); December 17, Muscat; December 23, Hayti (accessions to the conventions of 1831 and 1833).

1840. September 25, Bolivia; December 16, Texas.

1841. February 24, Mexico; May 24, Ecuador; August 7, Bolivia; Chili (additional); December 20, Austria; Prussia; Prussia, and Russia (ratified February 19, 1842).

1842. February 19 (see December 20, 1841); April 13, Mexico (additional); July 3, Portugal; August 9, the United States.

1844. November 8, Johanna.

1845. May 29, France; October 2, Muscat; Zanzibar.

1846. January 15, Ecuador (additional); with chiefs of Cape Mount, Africa.

1847. May 27, Borneo; with various Arab chiefs of the Persian Gulf, with Rio Nunez, Cagnabac, Manna, Bolola, Little Booton, Grand Sesters, Garraway River and others.

1848. February 24, Belgium; August 31, the Netherlands (additional); November 21, Liberia.

1850. May 6, Zanzibar.

1851. April 2, New Granada; August, Persia.

1852. January 13, Dahomey.

1853. February 2, Zanga Tanga and Cape Lopez.

1854. September 16, Mohilla; September 20, Comoro.

1857. March 4, Persia.

1862. April 7, United States.

1863. February 17, additional articles with ditto.

1865. June 27, Madagascar.

1870. June 3, United States (additional convention).

1871. June 18, Portugal (additional convention).

1873. June 5, Zanzibar.

1877. May 12, Dahomey; August 4, Egypt (convention).

war. This common right of all nations is, at present, acknowledged under the appellation of freedom of trade.' This right, however, is to be distinguished from the claim of one nation to trade with the colonies or dependencies of another.<sup>1</sup>

§ 13. To this right of trade there is a corresponding duty of mutual commerce, founded on the general law of nature; for, says Vattel, 'one country abounds in corn, another in pastures and cattle, a third in timber and metals; all these countries trading together, agreeably to human nature, no one will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than another; as for vineyards more than tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its industry and its ground in the most advantageous manner, and mankind in general proves a gainer by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce. Therefore, every one is not only to join in trade as far as it reasonably can, but even to countenance and promote it.'<sup>2</sup>

§ 14. The general right of trade, and the general duty of a State to facilitate commercial intercourse with others, are well settled principles of international law; nor is it anywhere denied that a nation has a right to decline a particular commerce which it may deem disadvantageous or injurious. But the question has sometimes been discussed, whether a State has a right to absolutely decline commercial intercourse with others, and whether, by so doing, it does not subject itself to punishment for a violation of a positive law of nations. Vattel says that, as every State has a perfect right to determine what is useful or salutary for it, it becomes a duty, as well as a right, for a nation to judge whether it is expedient to engage in a proposed trade, or to refuse any commercial overtures from others, and that such others have no 'right to accuse it of injustice, or to demand a reason for such refusal, much less, to use compulsion. It is free in the administration of its own affairs, without being accountable to any other. The obligation of trading with a foreign State is imperfect in itself, and gives them only an imperfect right; so that in cases where the commerce would be detrimental, it is entirely void.' 'The

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. ii. §§ 24, 48.

<sup>2</sup> Vattel, *suprà*.



Spaniards, falling on the Americans (Indians), under a pretence that these people refused to traffic with them, endeavoured in vain to cover their insatiable avarice.<sup>1</sup>

§ 15. China and Japan for a long time declined all commercial intercourse with other nations, and even now permit only a very restricted trade, in particular articles, and at particular places.<sup>2</sup> The question was at one time discussed, whether these people could not be compelled to open their ports to foreigners, and engage in trade and general intercourse with the rest of the world. But, as a question of international jurisprudence, it scarcely merits consideration. No doubt on this point could arise in the mind of any person except those who contend that the rules of international law, adopted by Christian nations, are wholly inapplicable to the countries of Asia. But this opinion, although at one time supported by writers of unquestionable ability, is now almost universally rejected by publicists.

§ 16. We have already discussed the duty of diplomatic intercourse, of legation, treaty, etc., and it is only necessary, in this place, to add a few remarks on the general character of the obligations resulting from this class of imperfect rights and duties. As already stated, a right is no less a right because it belongs to the class called *imperfect* in international law; so of a duty, it is none the less obligatory because it is *imperfect*, and cannot be enforced under the rules of international jurisprudence. Thus it is with the principles of natural law with respect to the mutual commerce of States. It is not difficult to point out the general duties of nations with respect to trade, but as each State is the exclusive judge of its own duty in any particular case, the application of a rule founded on generalities must always be uncertain. Therefore, says Vattel, if nations wish to secure to themselves something constant, punctual and determined in trade, treaties are the only means of procuring it.<sup>3</sup>

§ 17. With respect to the mutual duties of States, not established or taken cognisance of by the positive law of na-

<sup>1</sup> Vattel, *suprà*; Martens, *Précis du Droit des Gens*, §§ 139 et seq.; Massé, *Droit Commercial*, liv. i. tit. i.

<sup>2</sup> But considerable change has taken place in this respect. See *ante*, pp. 332-345.

<sup>3</sup> Vattel, *Droit des Gens*, liv. ii. ch. ii. § 26; Paley, *Moral and Pol. Philosophy*, b. ii. ch. x.

tions, but resting entirely on natural law, Vattel lays down the general principle that one State owes to another State whatever it owes to itself, as far as this other stands in need of assistance, and the latter can grant it without neglecting the duties it owes to itself.<sup>1</sup> Such, he says, is the eternal and immutable law of nature. In limitation or explanation of this rule, he makes the following observations: 'Social bodies, or sovereign States,' says Vattel, 'are much more capable of supporting themselves than individuals, and mutual assistance is not so necessary among them, nor of such frequent use. Now, whatever a nation can do itself, no succour is there due to it from others.'

§ 18. Among the mutual duties of States, arising from natural law, are the offices of humanity, such as relieving the distresses and wants of others, so far as is reconcilable with our duty towards ourselves. Thus, if a nation is suffering under a famine, all others having a quantity of provisions, are bound to relieve its distress, yet, without thereby exposing themselves to want. 'But,' continues Vattel, 'if this nation is able to pay for the provisions thus furnished, it is entirely lawful to sell them at a reasonable rate; for what it can pro-

<sup>1</sup> The House of Commons of Great Britain has received petitions from *foreigners*, but with the exception of two isolated cases the petitioners were resident in England, and the right of such to petition the House has never been questioned. The first exception was a petition from Dutchmen abroad complaining of grievances under which they suffered. It was presented on February 15th, 1648, during the Long Parliament, by Lord Joachimi, ambassador from the Netherlands, at the bar of the House: the mode of presentation was exceptional and the circumstances peculiar. The other case was a petition of the authorised agent, and a foreigner, at Augsburg, the chief representative of the Reimer family in Bavaria, claiming an estate in India, under the British Crown. It was presented by Mr. Dodson, in 1871. With regard to the House of Lords there seems to be no question but that foreigners resident abroad are entitled to petition that House in any appeal. Diplomatic complications, however, might arise if foreign subjects could forward petitions without their coming through their own authorities. There are cases in which petitions have been received by the Government direct from the petitioners, as in the case of the Nestorian Christians, the Wallachians, and Circassians, but their applications were not presented to Parliament as *petitions*. In 1873, a petition from Boulogne, in France, and signed by English and by French subjects, was sent direct to the British Foreign Office, and a similar petition was received from Tours in 1875.

In 1849, rules were drawn up that all foreign ambassadors should address through the Foreign Office. Colonists may petition direct. In 1827, Lord John Russell presented a petition from the inhabitants of Crete, who thought themselves included in the Treaty of 1827. It was an address to the British nation, not to Parliament, and was not received by the House of Commons.



cure is not due to it, and, consequently, there is no obligation of giving for nothing such things as it is able to purchase. Succour, in such a severe extremity, is essentially agreeable to human nature, and a civil nation very seldom is seen to be absolutely wanting in such.<sup>1</sup> Contributions of provisions, by the people of the United States, to the starving population of Ireland and Madeira, are examples of the performance of this natural duty.<sup>1</sup>

§ 19. The like assistance is due, whatever be the calamity by which a nation is afflicted. Whole sections of countries are sometimes devastated by floods, and cities and towns destroyed by fires or earthquakes, leaving vast numbers of people destitute of the means of shelter or subsistence. It is, first, the duty of their own government to provide for these wants; but not unfrequently the calamity is so great that the government is unable to give its aid to the extent and within the time required to render it efficacious. In such cases, the laws of humanity would impose a duty upon others. In many instances of this kind, however, the active charity of individuals and communities renders any action on the part of the governments of other States unnecessary. But a government may always stimulate and assist such charity, and by thus reflecting and giving effect to the general feelings of its people, manifest its sympathy and generosity. Of such a character was the assistance rendered by the government of the United States for transporting to Ireland the contributions of provisions spontaneously offered by the American people.<sup>2</sup>

§ 20. A question here arises, how far one State may afford assistance to another nation suffering famine and distresses which immediately result from the operations of a war. We refer, of course, to the offices of humanity, and not to assistance in the means of carrying on hostilities.<sup>3</sup> The furnishing of provisions and clothing to a starving and suffering people, may, or may not, assist in prolonging the war. In case of a

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. i. § 3.

<sup>2</sup> The philanthropy of the people of Great Britain is well known, nor has national expression of sympathy and pecuniary aid been wanting on their part towards other nations. To quote only one example. No sooner was the news of the conflagration of Chicago telegraphed to London, than 10,000*l.* was immediately subscribed, while large subscriptions were raised in provincial towns. The Common Council of the City of London gave 1,000 guineas.

<sup>3</sup> See the Geneva Convention, *post*, vol. ii. p. 81.

siege or blockade, no neutral State can furnish food to the inhabitants of the place so besieged or blockaded, without a violation of its neutral duties, no matter how much they may suffer, or how strong may be the dictates of humanity to relieve such suffering. So, also, an enemy may sometimes devastate whole sections of a country, and reduce the inhabitants to the miseries of famine, but this would not, *ipso facto*, justify another State to furnish them with relief. The rights and duties of the neutral will be determined by the peculiar circumstances of each case, and it would, therefore, be difficult to lay down any positive and invariable rule on this subject. There can be no doubt, however, that when the war is ended, or its operations are removed from the particular place or section of country, foreign nations may extend the offices of humanity to relieve the distresses of a suffering people. Of such a character was the assistance rendered by the people of the United States to the suffering inhabitants of modern Greece, in their struggle against the Turks.<sup>1</sup>

§ 21. Another question discussed by publicists is, how far it is the duty of one sovereign State to assist in preserving the independence of another State against the designs or attacks of its enemies. There can be no doubt of its duty to exert its moral influence, by way of advice, proffered mediation, etc., for the accomplishment of such an object; but this duty toward others does not extend to the use of force. The use of force for the benefit of others is not a matter of *obligation* (unless of treaty stipulation), and the question is entirely one of *policy*, which every State determines for itself. In Europe the question has been connected with that of preserving the equilibrium of power, and of preventing the aggrandisement of a particular State by the absorption of the dominions of another; as the case of Russia and Turkey in 1854.<sup>2</sup>

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. iii. cap. i. § 5; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xi.; Gardner, *Institutes*, p. 682.

<sup>2</sup> Phillimore, *On Int. Law*, vol. i. §§ 406 et seq.; Ortolan, *Domaine International*, tit. iii.; De Felice, *Droit de la Nat.*, etc., tome ii. lec. xvi.

Again in 1860, Lord J. Russell, writing to Earl Cowley concerning the annexation of Savoy and Nice to France, says,—“But Her Majesty’s Government must be allowed to remark that a demand for cession of a neighbour’s territory, made by a State so powerful as France and whose former and not very remote policy of territorial aggrandisement brought countless calamities upon Europe, cannot well fail to give umbrage to every State interested in the balance of power and in the maintenance of



§ 22. Having based the obligation of performing the offices of humanity solely on the law of nature, Vattel infers that no nation can refuse them to another on the plea of a difference of religious belief. 'A conformity of belief and worship,' he says, 'may become a new tie of friendship between nations, but no difference in them can warrant us to lay aside the quality of humanity, or the sentiments annexed to it.' He quotes with approbation the conduct of Pope Benedict XIV., who, on being informed that several Dutch ships at Civita Vecchia could not put to sea for fear of some Algerine corsairs, immediately ordered the frigates of the ecclesiastical States to convoy them out of danger; and his nuncio at Brussels was directed to signify to the states-general that His Holiness would perform the duties of humanity without reference to any difference of religion. The same rule extends to commercial rivals. The fact that a State, or any of its inhabitants, are our rivals in trade, would furnish us with no excuse for neglecting toward them the duties of humanity; on the contrary, those engaged in like pursuits are usually best acquainted with each other's wants, and best able to relieve each other's necessities. It also extends to cases of national hostility. Frequent wars and mutual aggressions sometimes produce feelings of deep-seated hostility between citizens and subjects of different States. Such enmities do not in any way affect the general obligations of humanity; unfortunately, however, they are not unfrequently made a pretext or excuse for neglecting their performance. The excuse is not admissible in morality, nor will it ever avail much in the general opinion of the world. National enmities, and national vanities, often blunt the sense of

the general peace. Nor can that umbrage be diminished by the grounds on which the claim is founded, because if a great military power like France is to demand the territory of a neighbour upon its own theory of what constitutes geographically its proper system of defence, it is evident no State could be secure from the aggressions of a more powerful neighbour; that might, not right, would henceforth be the rule to determine territorial possession; and that the integrity and independence of the smaller States of Europe would be placed in perpetual jeopardy.'

It is to be remarked that the intervention of Russia in the affairs of Turkey in 1854 and 1877 was based on the ground of religion and of the protection of the Oriental Christians. In 1707, Sweden interfered on behalf of the Protestants of Poland; while the treaties of Velau 1657, Oliva 1660, Utrecht 1714, and of Breslau 1742, testify to interference on behalf of the Catholic subjects of Protestant Sovereigns.

natural and moral duty, and are sometimes mistaken for patriotism.<sup>1</sup>

§ 23. As the reciprocation of the duties, or offices of humanity, says Vattel, 'is to take place betwixt nation and nation, according as one stands in need, and the other can reasonably comply with them, every nation being free, independent, and having the disposal of its actions, each is to consider whether its situation warrants asking or granting anything on this head. Every nation has a right to ask of another that assistance and kind offices which it conceives itself to stand in need of. This it cannot be denied without injury. If the demand be unnecessary it is thereby guilty of a breach of duty; but herein it does not depend on the judgment of another. A nation has a right of asking, but not of requiring.' Again, the same author remarks that these offices of humanity, 'being due only in necessity, and by a nation which can comply with them without being wanting to itself, the nation which is applied to, has, on the other hand, a right of judging whether the case really demands them, and whether circumstances will allow it to grant them consistently with what is owing to its own safety and concerns. For instance, a nation is in want of corn, and makes a demand to purchase of another, this latter is to judge whether such a compliance will not expose itself to scarcity; and a denial is to be acquiesced in without resentment.'<sup>2</sup>

§ 24. With respect to the rule and measure of the duties of nations to extend to others the offices of humanity and assistance, Vattel makes the following sensible and judicious remarks: 'Melancholy experience shows that most nations mind only strengthening and enriching themselves, at the expense of others, or lording it over them, and even, if an opportunity offers, of oppressing and bringing them under the yoke. Prudence does not allow us to strengthen an enemy, or him in whom we discover a desire of plundering and oppressing us, and the care of our safety forbids it. We have seen that a nation does not owe its assistance and the offices of humanity to another any further than as they are reconcilable with the duties towards itself. Hence, it evidently

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. i. §§ 15, 16; Leibner, *Political Ethics*, b. iii. §§ 65-67.

<sup>2</sup> *Ibid.*



follows that, though the universal law of mankind obliges us to grant, at all times, and to all, even to our enemies, those offices which are of a tendency to render them more moderate and virtuous, because no inconveniency is to be feared from such dispositions, yet we are not obliged to give them such succours as probably may be pernicious to ourselves. Thus, the exceeding importance of trade, not only to the wants and conveniences of life, but likewise to the forces of a State for furnishing it with the means of defending itself against its enemies, and the insatiable avidity of those nations which seek totally to engross it exclusive of others; thus, I say, these circumstances authorise a nation, possessed of a branch of trade, or the secret of some important manufacture or fabric, to reserve to itself those sources of wealth, and so far from communicating them, to take measures against it; but things necessary to the life or conveniency of others, this nation must sell them at a reasonable price, and not abuse its monopoly by iniquitous and hateful exactions. . . . As to things more directly useful for war, a people is under no obligation of selling them to others of whom it has any well-grounded suspicion; and even prudence declares against it.<sup>1</sup>

§ 25. Nothing tends more to the peace of the world, and the general comity and intercourse of nations, than mutual friendship and kind offices.<sup>2</sup> The cultivation of international

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. i. §§ 15, 16; Leibler, *Political Ethics*, b. iii. §§ 65-67.

<sup>2</sup> Among the good offices, which Maritime States are mutually interested in rendering to each other, are due facilities for recovering deserters.

By the 15 and 16 Vict. cap. 26, it is enacted that whenever it is made to appear to the British Government that due facilities will be given for recovering and apprehending seamen who desert from British merchant ships in the territories of any foreign power, an Order in Council, stating that such facilities are or will be given, may declare that seamen, not being slaves, who desert from merchant ships belonging to a subject of such power when within British dominions, shall be liable to be apprehended and carried on board their respective ships, and the operation of such order may be limited, and made subject to such qualifications as may be deemed expedient. Every justice of the peace or other officer having jurisdiction in the case of seamen who desert from British merchant ships in British dominions, shall, on application being made by a Consul of the foreign power to which such Order in Council relates, or his representative, aid in apprehending any seaman or apprentice who deserts from any merchant ship belonging to a subject of such Power, and may, upon complaint on oath duly made, issue his warrant for the apprehension of such deserter, and upon due proof of the desertion, order him to be conveyed on board the vessel to which he belongs, or to

good-will and friendship is, therefore, one of the first and highest duties imposed upon every sovereign State. Rulers, however, are too apt to neglect this duty, and to seek to exalt their own patriotism by depreciating other countries, and inciting in their own people feelings of unkindness and hostility to their neighbours. Such conduct is very reprehensible, and its results are generally dangerous, if not disastrous. For the authorities of one State to abuse and depreciate the government of another, is a sure indication of weakness and want of civilisation and refinement. National irritability is mentioned by Dymond as a most prominent cause of war. 'It is assumed,' he says, 'not indeed upon the most rational grounds, that the best way of supporting the dignity, and maintaining the security of a nation, is, when occasions of disagreement arise, to assume a high attitude and a fearless tone. We keep ourselves in a state of irritability, which is continually alive to occasions of offence, and he that is prepared to be offended, readily finds offences. . . . So well, indeed, is national irritability known to be an efficient cause of war, that they who, from any motive, wish to promote it, endeavour to rouse the temper of a people by stimulating their passions, just as the boys in our streets stimulate two dogs to fight. These persons talk of insults, or the encroachments, or the contempts of the destined enemy, with every artifice of aggravation; they tell us of foreigners who want to trample upon our rights, of rivals who ridicule our power, of foes who will crush, and of tyrants who will enslave us. They pursue their object, certainly, by efficacious means; they desire war, and, therefore, irritate our passions; and when men are angry, they are easily persuaded to fight.'<sup>1</sup>

be delivered to the owner or his agents, or to the master or mate of such vessel, to be conveyed on board. Any person who protects or harbours any deserter, liable to be apprehended under this Act, and having reason to believe that the same has deserted, shall be liable to a penalty of ten pounds. Every Order in Council under this Act shall be published in the *London Gazette*.

In questions of collision on the high seas, foreign vessels are bound by the customary Maritime Law, and not by municipal regulations. See the 'Zollverein' 4 *W. Rep.*, 555; the 'Borussia' 4 *W. Rep.*, 503; the 'Rumena' (May 24, 1856), *Shipping Gazette*; the 'Sylph' *Swab. Adm. R.*, 233; the 'Herefordshire' (Dec. 19, 1857), *Shipping Gazette*.

<sup>1</sup> Dymond, *Essays on the Prin. of Morality*, ess Felice, *Droit de la Nat.*, etc., tome ii. lec. xvi.



## CHAPTER XIV.

## SETTLEMENT OF INTERNATIONAL DISPUTES.

**Duty of moderation in international disputes—2. Two classes of means for their settlement—3. Amicable accommodation—4. Compromise—5. Mediation—6. Rejection of offers of mediation—7. Arbitration—8. Conferences and congresses—9. Retortion—10. Retaliation—11. Nature of reprisals—12. General and special reprisals—13. Positive and negative reprisals—14. Seizure of the thing in dispute—15. Necessity of proving title before seizure—16. Reprisals upon persons—17. Seizure and punishment of the individuals offending—18. If the government of the offenders assume their acts—19. Case of *McLeod*—20. Decision of the New York court—21. Opinion of Mr. Webster—22. The New York decision not authority—23. Opinions of American writers—24. Opinions of European publicists—25. Embargoes of property found within territory of injured State—26. General effect of reprisals, seizures and embargoes—27. Sir William Scott's opinion of the embargoes of 1803—28. Reprisals and embargoes, by whom authorised—29. In general, not in favour of foreigners—30. May be in favour of domiciled aliens.**

THE precepts of morality, as well as the principles of public law, by which human society is governed, render it obligatory upon a State, before resorting to arms, to try every pacific mode of settling its disputes with others, whether such disputes arise from rights denied or injuries received. This moderation is the more necessary, as it not unfrequently happens that what is at first looked upon as an injury or an insult, is found, upon a more deliberate examination, to be a mistake rather than an act of malice, or one designed to give offence. Moreover, the injury may result from the acts of inferior persons, which may not receive the approbation of their own government. A little moderation and delay in such cases may bring to the offended party a just satisfaction; whereas rash and precipitate measures often lead to the shedding of much innocent blood. The moderation of the government of the United States, in the case of the burning of the American steamboat 'Caroline,' in 1837, by a British officer,<sup>1</sup> led to an amicable adjustment of the difficulties arising from a violation of neutral territory, and saved both

<sup>1</sup> See *post*, pp. 429-31.

countries from the disasters of a bloody war. The moderation of the British admiral, in the recent affair at San Juan Island, is deserving of the highest praise.<sup>1</sup>

§ 2. The different modes of terminating disputes between independent States, short of actual war, are divided into two classes: first, *amicable*, or measures taken *vid amicabilem*; and second, *forcible*, or measures taken *vid factam*. The *amicable* modes or measures have been variously divided by publicists; the division most generally adopted is, into accommodation, compromise, mediation, arbitration, and conference. The *forcible* modes or measures are commonly known as retortion, retaliation, reprisal, seizure, and embargo. These divisions are, perhaps, not the most natural, nor are the lines of distinction between them always obvious or easily drawn. Nevertheless, as they have been adopted by writers of authority, and as these several terms are frequently used in works on international law, and require to be defined, we shall proceed to discuss each one separately.

§ 3. *Amicable accommodation* is where each party candidly examines the subject of dispute, with a sincere desire to preserve peace, by doing full justice to the other. In such cases, all doubtful points of etiquette will be yielded, and all uncertain and imaginary rights will be voluntarily renounced in order to effect an amicable adjustment of differences. If no compromise of the right in dispute can be effected, the question will be avoided by the substitution of some other arrangement which may be mutually satisfactory. Such conduct is worthy of great and magnanimous nations; weaker States seldom act with so much moderation. An example of amicable accommodation is found in the adjustment, by the treaty of Washington, in 1842,<sup>2</sup> of the differences between the United States and Great Britain, with respect to the right claimed by the latter to visit the vessels of the former in search for slavers on the coast of Africa.

§ 4. *Compromise* is where the two parties, without attempting to decide upon the justice of their conflicting pretensions, agree to recede on both sides, and either to divide the thing in dispute, or to indemnify the claimant who surrenders his

<sup>1</sup> Webster, *Dip. and Off. Papers*, pp. 104 et seq.; President's Message, Dec., 1859. For the further history of this affair, see *ante*, p. 152.

<sup>2</sup> But see *post*, ch. xxvii. § 9.



share to the other. As examples of compromise, we may refer to the negotiations terminating in the treaty of 1842, by which the Maine boundary question was satisfactorily adjusted, and to the negotiations terminating in the treaty of 1846, by which the Oregon difficulty was formally disposed of. Accommodation is a particular kind of compromise, and has therefore been deemed by some to be improperly classed as a distinct measure.<sup>1</sup>

§ 5. *Mediation* is where a common friend interposes his good offices to bring the contending parties to a mutual understanding. As this friend acts the part of a conciliator, rather than a judge, he may, while favouring the well-founded claims of one party, seek to induce him to relax something of his pretensions, if necessary, in order to secure peace. The mediator is essentially different from the arbitrator, although he frequently assumes the latter office also; he does not decide upon any of the matters in dispute, but merely seeks to reconcile conflicting opinions, and to moderate adverse pretensions. By thus calming the minds of the disputants, and disposing them to a reasonable accommodation or compromise, the mediator may often avert the evils and calamities of a resort to war. The task is a very delicate one, and the office of mediator requires great integrity and strict impartiality, for unless he possess these qualities in a pre-eminent degree, his efforts will not be likely to bring about the desired reconciliation of the disputants. Hubner deems it incumbent, upon neutrals generally, to act the part of mediators, in order to prevent, if possible, the breaking out of war. But Galiani is of opinion that, although the post of mediator may be accepted, the office is rather to be avoided than sought, on account of the danger to the mediator of compromising his neutrality. Phillimore prefers the Christian principle of Hubner to the more safe expediency of Galiani, but adds that 'much must depend upon the subject of dispute, the character of the disputants, and upon the position and authority of the State which tenders the good offices.'<sup>2</sup>

<sup>1</sup> *U. S. Statutes at Large*, vol. viii. p. 582, etc.

<sup>2</sup> Phillimore, *On Int. Law*, vol. iii. § 4; Hubner, *De la Saisie des Bâtimens Neu.*, tome i. pt. i. ch. ii. § 11; Galiani, *De' Doveri dei Principi Neu.*, ch. ix. p. 162.

The termination of the 23rd Protocol preceding the Treaty of Paris is as follows:—

§ 6. *Arbitration* is where the decision of a dispute is left to arbitrators chosen by common agreement. If the contending parties have agreed to abide by the decision of these referees, they are bound to do so, except in cases where the award is obtained by collusion, or is not confined within the limits of the submission. It is usual to specify, in the agreement to arbitrate, the exact questions which are to be decided by the arbitrators, and if they exceed these precise bounds and pretend to decide upon other points than those submitted to them, their decision is in no respects binding. Thus, the award of the king of the Netherlands, on reference by treaty, in 1827, of the question of the North-Eastern boundary of the United States, not being a decision of the question submitted to him, but a proposal for a compromise, was not regarded as binding either upon the United States or Great Britain, and was rejected by both, the dispute being afterward amicably settled by the parties themselves.

The following rules, mostly derived from the civil law, have been applied to international arbitrators, where not otherwise provided in the articles of reference. If there be an uneven number, the decision of a majority is conclusive. If there be only two, and they differ in opinion, they cannot

‘Whereupon the Plenipotentiaries (*i.e.*, of Austria, France, Great Britain, Prussia, Russia, Sardinia, Turkey) do not hesitate to express, in the name of their Government, the wish that States between which any serious misunderstanding may arise should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly Power. The Plenipotentiaries hope that the Governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present Protocol.’

England appealed to both France and Prussia, in 1870, when war was imminent between those two countries, to refer the difference to a friendly Power before having recourse to arms, agreeably to the above Protocol. France replied that she appreciated the utility of the rule, but reminded Great Britain of the reserve made on the subject and recorded in the same Protocol, viz. :—‘Que le vœu exprimé par le Congrès ne saurait en aucun cas opposer des limites à la liberté d’appréciation qu’aucune Puissance ne peut aliéner dans les questions qui touchent à sa dignité.’ She further explained that, much as she might be inclined to accept the good offers of a friendly Power, the refusal of the King of Prussia to give the guarantee which she was obliged to ask for, in order to prevent dynastic combinations dangerous to her safety and the care of her dignity, prevented her from taking any other course than that which she had adopted.—*Parl. Papers*, 1870.

It is to be observed that, although the Protocol does not contain any binding stipulations, it affords to Powers who are willing to appeal to it, an honourable and dignified means of avoiding war.



call in a third as umpire. The arbitration is dissolved by the death of any one of the referees. A decision once formally delivered cannot be reconsidered without a new agreement, for, when the opinion is delivered, the arbitration is *functus officio*. The arbitrators do not guarantee the execution of their award, and have no power to enforce it. Where the question is territorial, they cannot determine the possession as distinguished from the right of property; for, by the law of nations, the right of property draws after it the right of possession, and the owner is not to be prejudiced by the possession of another, nor is the possessor to be disturbed in his possession till the question of ownership is determined. But this does not preclude the arbitrators from inquiring into all the circumstances of possession as part of the evidence of title. In other words, they must determine the question of ownership from which follows the right of possession, and not upon the latter as a right distinct from the former.<sup>1</sup>

§ 7. Offers to arbitrate are not always accepted, nor is the State declining the proposal bound to give any reasons in justification for rejecting the proposal of the other disputant, or the proffer of a third power to act as arbitrator. 'It cannot,' says Phillimore, 'be laid down as a general and unqualified proposition, that it is the duty of States to adopt this mode of trial. There may, under the circumstances, be no third State willing, or qualified in all respects, for so arduous and invidious a task. Moreover, a State may feel that the contested right is one of vital importance, and one which she is not justified in submitting to the decision of any arbiter or arbiters.' By refusing either to arbitrate, or to accept an offered arbiter, we do not justly incur the suspicion that our intentions are unreasonable or our demands exorbitant. Nevertheless, if the question is not one of vital or of very serious importance, and we refuse to resort to this or any other

<sup>1</sup> Voet, *Com. ad Pandect.*, lib. iv. t. viii.; Grotius, *De Jur. Bel. ac Pac.*, lib. iii. cap. xx. § 48; Puffendorf, *De Jur. Nat. et Gent.*, lib. v. cap. xiii. § 6; Heffter, *Droit International*, § 109; Bello, *Derecho Internacional*, pt. i. cap. xi. § 1; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. viii.

By the Treaty of Washington, May 8, 1871, Great Britain and the United States agreed to refer two questions in dispute between them to arbitration. For details of the two arbitrations, see *ante*, p. 152, and vol. ii. p. 185.

amicable mode of settlement, such suspicion will be most likely to arise. The refusal to accept the mediation of a third party, not acting as arbiter or judge, but simply as a conciliator, would very seldom be justifiable.<sup>1</sup>

§ 8. *Conferences and international congresses* have frequently been resorted to, where differences exist between several States, and they are willing to discuss them in a spirit of conciliation, in order to bring them to an amicable settlement.<sup>2</sup> They are also often resorted to after the termination

<sup>1</sup> Phillimore, *On Int. Law*, vol. iii. § 3.

<sup>2</sup> But the British Government determined not to enter into any discussion at the Brussels Conference, 1874, concerning the rules of International Law, by which the relations of belligerents are guided, nor to undertake any new obligations or engagements of any kind in regard to general principles. A British delegate was, however, sent, on the distinct assurance from the Powers invited to take part in the Conference, that the delegates would be instructed to confine themselves to the consideration of details of military operations of the nature of those dealt with in the Project of the Russian Government, and would not entertain in any shape, directly or indirectly, anything relating to maritime operations or naval warfare.

When the more important articles of the Project came to be examined and discussed, instead of mere rules for the guidance of military commanders based upon usage, upon which a general understanding could be shown to be desirable in the interests of humanity, the articles were seen to contain or imply numerous innovations for which no practical necessity was proved to exist, and the result of which would have been greatly to the advantage of Powers having large armies constantly prepared for war and systems of compulsory military service. The British Government, therefore, on the conclusion of the Conference, refused to pursue or to take part in any further negotiations concerning it. They regarded the result to have been to demonstrate that there was no possibility of an agreement upon the really important articles of the Russian Project, and that the interests of the invader and the invaded are irreconcilable; that even, if certain rules of warfare could be framed in terms which would meet with acquiescence, they would prove to exercise little more than a fictitious restraint, an evil deprecated by the Russian Government at the opening of the Conference.

A brief review of some of the most striking differences of opinion may be of interest.

The first section of the first chapter occasioned an argument as to the meaning of 'occupation,' in the first article of the Project, which provided that: '1. The occupation by the enemy of a part of the territory of a State with which he is at war, suspends, *ipso facto*, the authority of the legal power of the latter, and substitutes in its place the military authority of the occupying State.'

The German view was that occupation is not altogether of the same character as a blockade, which is effective only when it is practically carried out. It does not always manifest itself by visible signs. If occupation is said to exist only where the military power is visible, insurrections are provoked, and the inhabitants suffer in consequence. A town left without troops must still be considered occupied, and any rising would be severely punished. Generally speaking, the occupying Power



of a general war, for the purpose of discussing and settling questions growing out of the operations of the war, and not in-

is established as soon as the population is disarmed, or even when the country is traversed by flying columns.

The Russian view was that the discussion turned upon the word 'territory.' This was a general expression which must be interpreted liberally (*interpréter largement*); a province could not be occupied at every point: that was impossible.

The view of Sweden and Norway was that greater power must not be accorded to the invader than he actually possesses. Occupation is strictly analogous to blockade, and can only be exercised where it is effective. The occupier must always be in sufficient strength to repress an outbreak. He proves his occupation by this act. An army establishes its occupation when its positions and lines of communications are secured by other corps. If a territory frees itself from the exercise of this authority, it ceases to be occupied. Occupation cannot be presumptive.

Modified articles were subsequently adopted, in which an effort was made to reconcile the conflicting views by the use of carefully balanced expressions.

In the opinion of the British Government the inhabitants of an invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy; while the existence of rules, the meaning of which is not distinct and indisputable, could not fail, should they ever be actually promulgated, to give rise to angry controversies which would intensify rather than mitigate the horrors of war.

The second chapter, relating to combatants and non-combatants, showed an equal difference of opinion, eventually smoothed over in a similar manner. The Swiss delegate, in his observations on the article requiring the use of a distinctive badge recognisable at a distance, remarked that a country might rise *en masse*, as Switzerland had formerly done, to defend itself, without organisation and under no command. The patriotic feeling which led to such a rising could not be kept down; and although these patriots, if defeated, might not be treated as peaceful citizens, it would not be admitted in advance that they were not belligerents.

During the discussion, the Netherlands' delegate remarked that if the plan laid down by the German delegate was to be sanctioned by the adoption of those articles which related to belligerents, as drawn up in the Project, it would either have the effect of diminishing the defensive power of the Netherlands, or would render universal and obligatory service necessary, a system to which public opinion in the Netherlands was still opposed. He, therefore, reserved more than ever the opinion of his Government. The Belgian delegate also made a declaration of reservation.

Upon the consideration of section 2, chapter i., 'of the rights of belligerents with reference to private individuals,' and 'of the military power with respect to private individuals,' the rights of national defence were again warmly urged by the Netherlands, Belgian, and Swiss delegates.

According to the view of the Netherlands, no country could possibly admit that, if a population of a *de facto* occupied district should rise in arms against the established authority of the invader, they should be subjected to the laws of war in force in the occupying army. He admitted that, in time of war, the occupier might occasionally be forced to treat with severity a population which might rise, and that, from its weakness, the population might be forced to submit; but he repudiated the idea of any Government contemplating the delivering over in advance

cluded in the stipulations of the treaty of peace. Other States than those who are parties to the dispute, being interested in

to the justice of the enemy those men who, from patriotic motives, and at their own risk, might expose themselves to all the dangers consequent upon a rising.

The delegate from Belgium added that if citizens were to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which they are about to be shot, the article of a Treaty signed by their own Government, which had in advance condemned them to death.

The Swiss delegate, who had previously pointed out that articles 45 and 9 (respecting conditions to be fulfilled by armed forces) were the cardinal points of the whole Project, declared that two questions, diametrically opposed to each other, were before the Committee: the maxims and interests, on the one hand, of great armies in an enemy's country, which imperatively demand security for their communications and for their *rayon* of occupation; and, on the other hand, the principles of war and the interests of the invaded, which cannot admit that a population should be handed over as criminals to justice, for having taken up arms against the enemy. A reconciliation of these conflicting interests was, in his opinion, impossible in the case of a *levée en masse* in an occupied country. In the face of the opposite opinions expressed on the articles under discussion, only a provisional modification of them was accepted by the meeting, omitting those upon which the greatest disagreement had been shown. The Conference was unable to arrive even at a provisional modification of chapter ii., 'of requisitions and contributions,' and, after a variety of views had been expressed, of the most opposite character, the course was adopted of accepting a certain reading in the Project and entering the dissentient opinions in the Protocol.

The articles in section 4, 'on reprisals,' did not attain to this stage. The general feeling seemed to be that occasions on which reprisals of a severe character had been executed were of far too recent a date to allow the practice to be discussed calmly, and the articles were withdrawn; but in passing over these articles in silence, the delegates really evaded one of the principal difficulties inherent in any scheme for the preparation of the rules of war to be observed by belligerents—namely, the question how those rules are to be enforced.

Rules of international law in which the interests of neutrals and belligerents are concerned can be enforced in the last resort by recourse to war.

In the case, however, of countries already engaged in hostilities, there will be no means, except by reprisals, for either belligerent to enforce upon the other the observance of any set rules.

It is true that, on the outbreak of war, it would be almost certain that one or other belligerent would appeal to neutral nations against some real, or supposed, infraction of these rules by his opponent. It can, however, scarcely be seriously contemplated that neutral countries should intervene to enforce their observance; and, unless their interference were attended by the exercise of compulsion, in which case the circle of hostilities would soon be indefinitely enlarged, it cannot be supposed that the contending nations would respect it.

The remaining articles of the Project, in the words of Baron Jomini, 'ont été l'objet de rédactions transactionnelles, destinées à concilier toutes les nuances d'opinion.' They relate to the 'means of injuring the enemy,' 'sieges and bombardments,' 'spies,' 'prisoners of war,' 'bearers of flags of truce,' 'capitulations,' 'sick and wounded,' 'armistices,' 'belligerents



the determination of the questions submitted, or at least in the preservation of peace, are most usually invited to take part in these conferences. In order to afford a prospect of success in these deliberations, the plenipotentiaries sent to these congresses should be actuated by a sincere desire to effect a just and amicable settlement of the questions to be discussed. This, however, has not often been the case. The congresses of Cambray, in 1724, and of Soissons, in 1728, are characterised by Vattel as 'dull farces played on the political theatre, in which the principal-actors were less desirous of producing an accommodation, than of appearing to desire it.' Moreover, they have generally been under the control of the great European monarchical States and republics, or the smaller sovereignties have had very little weight in their deliberations. Thus, the congresses of Paris and Vienna, in 1814 and 1815, were mainly meetings of conquerors, for dividing among themselves the spoils of conquest, and for mutually agreeing among themselves to what extent each of the greater powers should be permitted to rob its weaker neighbours. 'We know from history,' says Phillimore, 'that congresses of crowned heads have not always proved themselves to be impartial or competent tribunals of international law.' For this reason, smaller States seldom willingly submit their disputes to the

interned, and wounded treated in neutral territory.' Of these, the articles on sick and wounded, originally seven in number, have been reduced to one, relegating the whole matter to the operation of the Geneva Convention. The articles relating to capitulations and armistices are also merely formal. Those concerning spies and flags of truce only profess to record existing military practice, as do the articles respecting sieges and bombardments. The twelve articles with regard to prisoners of war appear to be important only in so far as they show the manner in which the original objects of the Project, and the humane intentions of the Emperor of Russia, have become obscured in the attempt to devise general rules of warfare. The articles themselves may possibly serve some useful purpose in recording the view taken by the delegates at Brussels of some details of the usual treatment of prisoners of war. From the spirit of compromise adopted in framing the articles, as mentioned by Baron Jomini, it is more than probable that a close scrutiny would show that many of the articles admit, or invite, differences of interpretation. It is hardly necessary to point out how serious would be the consequences should this be found to be the case in respect to the articles on belligerents interned and of wounded treated in neutral territory.—See *Parl. Papers*, 1874-5. Besides the delegates mentioned above, delegates from Austria, Denmark, Spain, France, Greece, and Italy, attended the Conference. The United States refused to be represented, on the ground of the lateness of the invitation. The articles framed by the delegates have not yet been adopted by any Power. They will be found distributed throughout the second volume of this work.

decision of such tribunals. The congress of Paris, in 1856, by the justice of its acts, somewhat redeemed the general reputation of European conventions of nations. The right of such bodies to *intervene* in the affairs of States has been discussed in another place, and will again be alluded to in the chapter on the different kinds of wars.<sup>1</sup>

§ 9. *Retorsion*, called by some amicable retaliation, and *retortion de droit*, is where one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances. Thus, if one State should make aggressive laws respecting the property, or trade, or personal rights of the citizens of another State, the latter may retort, by enacting similar laws against the citizens of the former. There is nothing in this contrary to justice and sound policy, so long as it does not degenerate into cruel and barbarous treatment of private individuals. This kind of retaliation usually follows the breach of what are called imperfect obligations, and which do not justify a resort to forcible measures.<sup>2</sup>

§ 10. *Retaliation*, or, as it is sometimes called, vindictive retaliation, or *retorsio facti*, is where one State seeks to make another, or its citizens, suffer the same amount of evil which the latter has inflicted upon the former. Retaliation should be limited to such punishments as may be requisite for our own safety and the good of society; beyond this it cannot be justified. We have no right to mutilate the ambassador of a barbarous power, because his sovereign has treated our ambassador in that manner, nor to put prisoners and hostages to death, and to destroy private property, merely because our enemy has done this to us; for no individual is justly chargeable with the guilt of a personal crime for the acts of the community of which he is a member. Retaliation of this kind should be confined, as a general rule, to the individuals who have committed the violation of public law. There may be extraordinary cases which constitute an exception to this rule, but these must be judged according to the peculiar circumstances by which they are attended. 'Instances of reso-

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 330; Phillimore, *On Int. Law*, vol. i. § 398; vol. ii. § 3; Vide *ante*, chapter iv., and *post*, chapter xvi.

<sup>2</sup> Martens, *Précis du Droit des Gens*, § 254; the 'Girolamo,' 3 *Hagg. R.*, 185; Polson, *Law of Nations*, sec. vi.



lutions to retaliate on innocent prisoners of war,' says Kent, 'occurred in this country during the revolutionary war, as well as during that of 1812; but there was no instance in which retaliation, beyond the measure of secure confinement, took place in respect to prisoners of war.' Vindictive retaliation is sometimes applied to the property of the offending State or individual, but such acts are usually of a belligerent character, and will be discussed in another place.<sup>1</sup>

§ 11. *Reprisals* are resorted to for the redress of injuries inflicted upon the State, in its collective capacity, or upon the right of individuals to whom it owes protection in return for their allegiance. They consist in the forcible taking of things belonging to the offending State, or of its subjects, and holding them until a satisfactory reparation is made for the alleged injury. If the dispute is afterwards arranged, the things thus taken away by way of reprisal are restored, or, if confiscated and sold, are paid for with interest and damages; but if war should result, they are condemned and disposed of in the same manner as other captured property, taken as prize of war. As reprisals bring us to the awful confines of actual war, it is proper to inquire what kind of injuries, inflicted upon the State collectively, or upon its individual members, justify a resort to so dangerous a measure of redress. It is only in cases where justice has been *plainly denied*, or *most unreasonably delayed*, that a sovereign State can be justified in authorising reprisals upon the property of another nation. Moreover, the delay must be of such a character as to render it tantamount to a denial of justice. Thus, if the claim be a national one, it must be properly demanded, and the demand refused. If it be of an individual, the claimant must first exhaust the legal remedies in the tribunals of the State from which the claim is due, and after an absolute denial of justice by such tribunals, his own government must make the demand of the sovereign authorities of the offending nation. Although the presumption of law is clearly in favour of the decisions of the lawfully constituted tribunals of a State, yet, if it is plain that justice has been administered partially, and in a different manner to the foreigner than to the subject, the government

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. pp. 93, 94; *Journals of the Congress under the Confed.*, vol. ii. p. 245; vol. vii. pp. 9-147; vol. viii. p. 10; President's Messages, Dec. 7, 1813, and Oct. 28, 1814.

of the injured party may, notwithstanding such decision, demand justice, and if it be refused, resort to reprisals. It was a doctrine of the Roman law, that an unjust sentence does not extinguish a just debt. Subjects must submit to the authority of the law, however great the injustice; but foreigners are under no such obligation, for their own State may, by force, compel the execution of justice on their behalf. In 1850, the British Government authorised reprisals upon the Greeks for a claim of one *Pacifico*, a British subject, who had not first prosecuted it in the Greek tribunals. The protest of the Greek Government, and the remonstrance addressed by Russia to the British Government, contain a strong but dignified rebuke for an act so manifestly in violation of international law; moreover, the conduct of the British foreign minister was censured by a large majority of the House of Peers. The mediation of France effected an adjustment of the dispute, and the claim of *Pacifico*, for twenty-one thousand two hundred and ninety-five pounds one shilling and fourpence, was referred to commissioners appointed for that purpose, who awarded to him the sum of one hundred and fifty pounds! What a paltry sum for a great nation to authorise reprisals upon a weaker State, and that, too, without first making the proper and legal demand!<sup>1</sup>

<sup>1</sup> *Annual Reg.*, 1850, vol. xcii. pp. 281-286; Hansard, *Parl. Deb.*, 1850; De Cussy, *Droit Maritime*, liv. ii. ch. xxxvii.

The principle upon which the British Government appear to have acted, was founded upon the particular circumstances of the case. It is impossible to maintain that in all cases foreigners are entitled to compensation from the Government of the country in which they may have sustained injury or loss, but it is equally impossible to maintain that there are not cases wherein, by the law of nations, compensation may be justly due to foreigners who have sustained injuries and losses in other countries. Vattel says that accidents, resulting inevitably from the measures of war, are not the subject of compensation, but that where the losses are wanton, or unnecessary for carrying out the operations, they might be so. *Pacifico* was a Jew, but born a British subject; his house was broken open by a mob, his family beaten, and his whole property destroyed. He appealed to the Greek Government for 21,295*l.* 1*s.* 4*d.*, but neither obtaining that nor any reparation, he sought the protection of Great Britain, who interfered. This exception to the rule of international law is not uncalled for in despotic or half-civilised countries, or where, as alleged in the present case, the local tribunals are corrupt, and this affords considerable protection to travellers and to British commerce. The British Minister at the Court of Athens had been promised by the Greek Government a settlement of the full claim, but more reasonable and more just terms having, in the meantime, been agreed on in the London Convention, the British Government substituted the terms of the latter.



§ 12. Reprisals may be either *general* or *special*. They are *general* where one State awards to its subjects a general permission to seize the goods or persons of the offending nation upon the high seas, or wherever found without the jurisdiction of another State. They are *special* where such permission is limited to particular persons or things, or in time and place. Licences, or letters of marque, to the injured persons, authorising them to indemnify themselves upon the property of the subjects of the offending State, wherever found, have almost entirely fallen into disuse, and the term itself is now somewhat differently applied, the commissions issued to privateers in time of actual war being ordinarily denominated *letters of marque*. These are not to be confounded with *letters of reprisal*. General permission to all the citizens of one State to make reprisals upon the property and persons of all citizens of another State, is little short of actual war, although considered in international law as without the pale of the rules applicable to war. The captors are not entitled to exercise the rights of war either toward the subjects of the offending State, or toward neutrals, nor are the persons or goods captured subject to the rules applicable to belligerent captures. Such matters are regulated by the law or authority authorising the reprisals, and the acts of the parties making them are to be regulated and judged of by such law or authority, but they must, in no case, be in violation of the rules of international law which may be applicable.<sup>1</sup>

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 2; Kluber, *Droit des Gens Mod.*, § 234; Polson, *Law of Nations*, sec. vi.; Duverdy et Pistoye, *Traité des Prises*, tit. i. ch. iii. sec. iii.

It was an ancient custom in England, when a merchant had been robbed at sea or despoiled of his property, for the King to issue a commission, under the great seal, to inquire into the robbery, and to punish the offenders, or to give damages in the case of fraud in the mercantile contract. This commission proceeded in conformity with three laws, *i.e.* the law and custom of England, the Merchant Law and the Maritime Law. —50 *Eliz.*, 3 par. 2 *Dors.* 24 de audiend. et terminand. mercatoribus super mare deprædatis.—*Pat.* 6, E. 1, m. 24 *Dors.*, the case of Will. de Dunstaple, a citizen, of Winton. *Pat.* 32 *Eliz.* 1 m. 4 pro Willielmo Perin et Domingo Perez mercatoribus.

On complaint by British merchants, about the year 1431, that the Danes had seized some cargoes of their ships, and that no Danes came to England on whom they could make reprisals, it was enacted by statute that the complainants should be entitled to letters of privy seal, and that if this should not ensure satisfaction to them, the King would otherwise provide it.

§ 13. Another division of reprisals, made by writers on public law, is, into *positive* and *negative*, or, as termed by some writers, *active* and *passive*. Reprisals are *negative* when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims; they are *positive* when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction. The same rule applies to both of these classes, that is, neither should be resorted to except where the cause is manifestly just, and after all milder means have proved ineffectual. Negative reprisals, however, are, in general, less likely to produce an immediate rupture than those of a positive character. Nations are more ready to repel force than to employ it.

§ 14. *Seizure* is a general term applicable to the forcible taking of the persons or property of others, and is applied alike to reprisals and belligerent captures made in war. But, in its more restricted sense, as applied to measures taken *vid facti*, or forcible means of settling international disputes, the term is limited to taking forcible possession of the thing in dispute, or of the persons by whom the offence is committed. The seizure of the thing in controversy is generally regarded as the preliminary step toward the commencement of a war. It is, nevertheless, neither an actual nor a formal declaration of hostilities, and there is, therefore, still a possibility of a settlement of the dispute, before entering into a state of solemn and public war. In other words, it does not make the subjects of the two States public enemies, or give to either the rights of war, as against the other, or with respect to neutrals. If, however, war should immediately follow such seizure, it would be classed as a belligerent act in all its consequences. Thus, the seizure of San Juan island, in 1859, was, unquestionably, an act of hostility, but not, in its results, an act of war.<sup>1</sup>

§ 15. But before taking such forcible possession, it is neces-

Louis XVI., in 1778, granted permission to the merchants of Bordeaux to make reprisals against England. This appears to be the latest French case on that subject.

During the Crimean war, general reprisals were granted by Great Britain against the ships, vessels, and goods of Russia. See Order in Council, March 29, 1854.

<sup>1</sup> Polson, *Law of Nations*, sec. vi.; President's Message, Dec. 1859.



sary for us to prove clearly our right to the thing in dispute, and also that we have already tried the milder modes of adjustment, for other people are not obliged to respect that title any further than we show its validity, nor will they justify us in resorting to a measure of so much rigour, and one, too, so likely to produce the most serious consequences to society, until we justify our conduct on the ground of its absolute necessity. The possessor may, therefore, remain in possession till proof is adduced to convince him that his possession is unjust. 'As long as that remains undone,' says Vattel, 'he has a right to maintain himself in it, and even to recover it by force, if he has been despoiled of it. Consequently, it is not allowable to take up arms in order to obtain possession of a thing to which the claimant has but an uncertain or doubtful right. He is only justifiable in compelling the possessor, by force of arms, if necessary, to come to a discussion of the question, to accede to some reasonable mode of decision or accommodation, or, finally, to settle the point by articles of agreement upon an equitable footing.' And where the title to the things seized seems indisputable, to attempt to gain forcible possession against the actual occupant, without first resorting to the milder modes of adjustment, is equally as objectionable as it would be to declare war under the same circumstances. Indeed, it may be regarded as even more objectionable, for the reason that such seizures are sometimes made by subordinate authorities, without consulting the war-making power of the State.<sup>1</sup>

§ 16. It is a well-settled principle of international law, that reprisals, strictly speaking, affect the *persons* as well as the *property* of the subjects of the government against which they are granted; but, in modern times, they have been chiefly confined to *goods*. In executing the right of reprisal upon vessels, the persons of the commanders and crews are necessarily affected, although it is usual to release them immediately on bringing into port the vessel taken by way of reprisal. Nevertheless, the right of reprisal extends also to all persons of the offending nation. Vattel very justly remarks that 'as we may seize the things which belong to a nation in order to compel it to do us justice, we may equally, for the same reason, arrest some of its citizens and retain them till we receive full

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 337.

satisfaction. This is what the Greeks called *Androlepsia*.<sup>1</sup> The practice of ancient times, in this respect, is not often followed by modern civilised nations, except by way of retaliation, or in the case of taking vessels on the high seas, in the manner already alluded to. It is proper to remark that all subjects of the injuring government are liable to reprisals, whether they be native, naturalised, or domiciled, but travellers and passing guests are, in general, excepted from such liability.<sup>1</sup>

§ 17. But the seizure and punishment of the individuals offending is an act not unusual on the part of the offended State. Where such persons are found within the jurisdiction of the State, and they are duly tried and condemned by the lawfully constituted tribunals of the country, the act is nothing more than the ordinary and legitimate exercise of the authority of sovereign and independent States. But such offenders are sometimes seized upon the high seas, or elsewhere beyond the jurisdiction of the offended nation, an exercise of force which is justifiable only in case of offences most manifest and palpable, and where the government of the offender plainly refuses, or most unreasonably delays, to inflict punishment, to surrender the criminal, or to afford satisfaction. Such forcible seizure beyond the jurisdiction of the State is an act, not of war, but in violation of pacific international rights, and is sometimes followed by war, although more usually by a demand for explanation and satisfaction. And such diplomatic discussion, if properly conducted, will generally lead to an arrangement both of the original offence and of the consequent forcible seizure. The act, however, is, in its character, hostile.<sup>2</sup>

§ 18. In case the government of the offending individuals should assume the responsibility of their acts, the question arises, whether the seizing and holding of the individuals for punishment, under the municipal laws of a State, is justified by the law of nations, or whether such a proceeding is to be regarded as a reprisal or forcible seizure, hostile in its nature, and which, without explanation or satisfaction, might justify retaliation or war. The question is one of the highest importance, as its determination may lead to the most serious

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 351 ; 'Le Louis,' 2 *Dod. R.*, 245.

<sup>2</sup> Ortolan, *Diplomatie de la Mer*, liv. ii. ch. xvi. ; vide ante, chap. 7.



results. There seems to have been at one time a difference of opinion on this subject in the United States, and a conflict of jurisdiction, as claimed by the Federal authorities and State tribunals. All difficulties, however, were afterward removed by the act of congress passed August 29, 1842, directing the discharge of any subjects or citizens of a foreign State, and domiciled therein, confined, or in custody for any act done or omitted under the authority of a foreign State or sovereignty, the validity or effect whereof depends upon the law of nations.

§ 19. The case which gave rise to this difficulty, and to the subsequent act of congress, was that of Alexander McLeod, who was indicted, in 1841, for the burning of the steamboat 'Caroline,' and the killing of one Amos Durfee, in effecting the capture of that steamboat within the jurisdiction of the State of New York, in December, 1837. The responsibility of McLeod's acts was assumed by the British Government, as having been done by its authority and under its protection, McLeod having acted as an officer of that government, and under the orders of his superiors. This was one of the grounds on which the discharge of McLeod from custody was demanded. The case was argued at great length and with distinguished ability on both sides, and the decision, it was thought, would determine the question of peace or war between the United States and Great Britain.

§ 20. The supreme court of the State of New York held that a subject of a foreign State was liable to be proceeded against *individually*, and tried on an indictment in the criminal courts for *arson* and *murder*, notwithstanding the acts for which the indictment was made had been subsequently avowed by his government, and it, consequently, refused to discharge him from custody. The opinion of the court was delivered by Mr. Justice Cowen, and is of great length. So far as the question of national law is concerned, the opinion rests upon the proposition, that till war is declared by the war-making power, the officers or citizens of a foreign government, who enter our territory, are as completely obnoxious to punishment by our law as if they had been born and always resided in this country; that while two nations are at peace with each other, the acts of hostility by individuals must be regarded as *private*, and not *public* acts, and that the courts will hold the

parties *individually* responsible, notwithstanding the avowal of such acts by their government.<sup>1</sup>

§ 21. Mr. Webster, the American secretary of State, in his correspondence with Mr. Fox, the British minister, said that 'The Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilised States, to be holden personally responsible in the ordinary tribunals of law for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals when the act complained of is declared to have been an act of government itself. . . . The indictment against McLeod is pending in a State court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government. He demands impunity from personal responsibility, by virtue of the law of nations, and that law, in civilised States, is to be respected in all courts.' On another occasion, he spoke of the opinion of Mr. Justice Cowen as 'not entitled to be called a respectable opinion.'<sup>2</sup>

<sup>1</sup> The People v. McLeod, 25 *Wend. R.*, 483; Webster, *the Works of* vol. vi. pp. 247-270; Phillimore, *Letter to Lord Ashburton*, 1842, pp. 27, 183.

<sup>2</sup> During the disturbances in Upper Canada, in the winter of 1837, a steamboat called the 'Caroline,' belonging to an American owner, had been actively engaged in conveying arms and stores from the American side of the river to the Canadian rebels, who were in possession of Navy Island, and had been boarded in the night time by a party of Canadian Royalists, while she was lying within the jurisdiction of the territory of New York, set on fire, and sent down the stream, when she was precipitated over the Falls of Niagara and dashed to pieces. An American citizen, named Durfee, was killed in the affray, and several others were wounded.

In the month of January, 1841, a British subject domiciled in Canada, named Alexander McLeod, was suddenly arrested while engaged in some business, within the territory of the State of New York, and thrown into prison by the authorities, on the charge of having been concerned in the destruction of the 'Caroline,' and the alleged murder of Durfee. A correspondence immediately ensued between the British Ambassador, Mr. Fox, and Mr. Forsyth, the American Minister of Foreign Affairs. Mr. Fox called upon the Government of the United States to take prompt and effectual steps for the liberation of Mr. McLeod.

'It is well known,' said Mr. Fox, 'that the destruction of the steamboat



§ 22. As McLeod was *acquitted* on the trial, there was no opportunity to obtain, by appeal to the federal courts, an opinion of the highest tribunal of the United States on this important question, and the subsequent act of congress has obviated all danger of the recurrence of a similar case. The opinion of Mr. Justice Cowen, however, seems not to have received the approbation of the best judicial minds of his own State,

"Caroline," was a public act of persons in Her Majesty's service, obeying the orders of the superior authorities. That act, therefore, according to the usages of nations, can only be the subject of discussion between the two national Governments. It cannot justly be made the ground of legal proceedings in the United States against the individuals concerned, who were bound to obey the authorities appointed by their own Government.'

Mr. Fox, in reply to the note of Mr. Forsyth, in which the application for the relief of McLeod was refused, 'regrets this refusal, and intimates that it and the ill-treatment of McLeod will lead to the most grave and serious consequences. He states again that the attack on the "Caroline" was made in pursuance of orders from the Colonial Authorities, and he says that the "Caroline" was a piratical vessel and was but nominally within the jurisdiction of the United States. The authorities of New York had been unable to maintain their jurisdiction at the place where the "Caroline" was attacked, or even to prevent the pirates from carrying off from that place the cannon belonging to the State. He was not authorised to state what were the views of Her Majesty's Government on this subject, but he took this occasion to place his own opinion on record.'

Mr. Forsyth expresses his belief that 'Mr. Fox would not entertain this opinion if he had seen the whole evidence on the subject, which was carefully collected by the United States and communicated to the British Government. He has no more to say to Mr. Fox on the matter, and awaits the result of the demand upon Great Britain for reparation.'

McLeod was, in the month of May, removed by *habeas corpus* from Lockport to New York, in the custody of the Sheriff of Niagara County. Previously to this, the following note, dated March 12, 1841, was sent by Mr. Fox to Mr. Webster, the new American Foreign Secretary :—

'Her Majesty's Government have had under consideration the subject of the arrest and imprisonment of Alexander McLeod, on a pretended charge of arson and murder; and I am directed to make known to the Government of the United States, that the British Government entirely approved of the course pursued by him. I am instructed to demand formally, and in the name of the British Government, the immediate release of Alexander McLeod, for the reason that the transaction was of a public character, planned and executed by persons duly authorised by the Colonial Government to take such measures as might be necessary for protecting the property and lives of Her Majesty's subjects; and being, therefore, an act of public duty, they cannot be held responsible to the laws and tribunals of any foreign country.'

Mr. Webster replied (as in the text, § 21). But, notwithstanding this admission of the United States Government as to the principles of public law, the complicated nature of the Federal system gave the State of New York a separate claim to adjudicate in the case of McLeod, irrespective of the question of international law, and he was tried at Utica for arson and murder. A verdict of not guilty, however, terminated what might have become a very serious affair.—*Ann. Reg.*, vol. lxxxiii. 310.

and to have been very generally condemned in other States, and by the political authorities of the federal government. It can, therefore, hardly be regarded as an authoritative exposition of the principles of international law, however sound its interpretation of the statutes of his own State may be regarded by the courts of that State. Moreover, opinions and decisions of State courts are not deemed of binding authority in questions of international law, even where supported by sound reasons, the federal courts alone having jurisdiction of questions of that nature.<sup>1</sup>

§ 23. Mr. Lee, the third attorney-general of the United States, says: 'It is as well settled in the United States as in Great Britain that a person, acting under a commission from the sovereign of a foreign nation, is not amenable for what he does, in pursuance of his commission, to any judiciary tribunal of the United States.' Judge Story, in speaking of the seizure of an American vessel and cargo by a Spanish vessel, said, that if she had a commission, it was an act of the Spanish Government; and if she had no commission, but the act was *adopted and acknowledged by the crown, or its competent authorities*, the seizure must be considered as for the benefit of the crown, and the property, when condemned, becomes a *droit* of the Government. This view of the question is supported by the opinions of Chancellor Kent, Chief Justice Spencer, and Judge Tallmadge, of New York; Chief Justice Gibson, of Pennsylvania; Professor Greenleaf, of Harvard University, and numerous other distinguished jurists of the United States.<sup>2</sup>

§ 24. Among European writers on public law, there seems to be a very general unanimity of opinion. Vattel says that 'on all occasions susceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgment to those who hold the reins of government.' The sovereign alone is to be held guilty for the acts of unlawful war; he alone is bound to repair the injuries, and not those who act under his authority. 'The subjects, and in particular the military, are innocent, they have acted only from a necessary obedience.' Rutherford says that even in an imperfect sort of war, 'what the members do, who act

<sup>1</sup> Webster, *Dip. and Off. Papers*, pp. 120, 140.

<sup>2</sup> Lee, *Opinions of U. S. Attys Gen.*, vol. i. p. 81; Carrington, et al. v. C. Ins. Co., 8 *Peters Rep.*, p. 522; Tallmadge, *Review, etc.*, 26 *Wendell Rep.*, app., p. 674.



under the particular direction and authority of their nation, is, by the law of nations, no personal crime in them; they cannot, therefore, be punished, consistently with this law, for any act in which it considers them only as the instruments, and the nation as the agent.' Burlamaqui says that the mere presumption of the will of the sovereign will not be sufficient to excuse a governor, or any other officer, for committing acts of war. But if the sovereign ratify such acts, this approbation reflects back the authority of the sovereign upon the acts, and so obliges the whole commonwealth.<sup>1</sup>

§ 25. *An embargo* is a species of reprisal upon the property of the offending nation, found within the territory of the injured State, by prohibiting the departure of vessels, or the removal of goods. An embargo may, or may not, be followed by the sequestration of the goods and property detained. If war follows, it is said to have a retroactive effect, and the detained goods are considered as the property of enemies taken in war. But if the difficulty which led to the embargo is amicably arranged, they are released upon the terms which the parties may stipulate in such arrangement. In maritime embargoes, persons as well as goods are usually seized and retained, to be subsequently released, or treated as prisoners of war, according as the embargo results in peace or solemn war. An embargo is more usually resorted to in contemplation of hostilities than as a mode of settling disputes between States. It is therefore classed by Phillimore as a measure of redress, 'midway between reprisals and war.'<sup>2</sup>

§ 26. The resort to reprisals, seizures, or embargoes, or forcible means of redress between nations, may assume the

<sup>1</sup> Vattel, *Droit des Gens*, liv. iii. ch. ii. § 187; Rutherforth, *Institutes*, b. ii. ch. ix. § 18; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. part iv. ch. iii. §§ 18, 19.

<sup>2</sup> Phillimore, *On Int. Law*, vol. iii. §§ 24-26; Valin, *Traité des Prises*, liv. iii. tit. x.; the 'Theresa Bonita,' 4 Rob., 245; the 'Boedes Lust,' 5 Rob., 245.

According to the law of England, a Sovereign may prohibit any of his subjects from leaving the realm; a proclamation, therefore, forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an Act of Parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity), being contrary to law, and particularly to statute 22, Car. II., c. 13, the advisers of such a proclamation, and all persons acting under it, deemed it necessary to be indemnified by a special Act of Parliament, viz., 7 George III., 7.—Blackst. *Comm.* ii.

character of war, in case they fail to produce the satisfaction demanded of the offending State. Such acts, as already remarked, not being positive acts of war, the effects seized are not usually condemned till the question of peace or war is finally decided. If peace should be continued, they are restored, but if war follows, they are confiscated. 'Reprisals,' says Vattel, 'are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt or repair an injury, or to make a just satisfaction, the latter may seize what belongs to the former, and apply it to its own advantage, till it obtains full payment for what is due, together with interest and damages; or keep it as a pledge till the offending nation has made ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that the war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated.' These remarks are more particularly applicable to *general* reprisals, although, even then, sequestration sometimes immediately follows the seizure. Where such extreme measures are resorted to it is not easy to distinguish between them and actual hostilities. But in *special* reprisals, made for the indemnification of injuries upon individuals, and limited to particular places and things, immediate confiscation is more frequently resorted to. Thus, Cromwell having made a demand on Cardinal Mazarin, during the minority of Louis XIV., for indemnity to a Quaker, whose vessel had been illegally seized and confiscated on the coast of France, and receiving no reply within the three days specified in the demand, dispatched two ships of war to make prize of French vessels in the channel. The vessels were seized and sold, the Quaker paid out of the proceeds the value of his loss, and the French ambassador apprised that the residue was at his service. This substantial act of justice caused neither reclamation nor war.<sup>1</sup>

<sup>1</sup> Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 342.

In the month of June, 1838, the King of Naples granted to a com-



§ 27. When an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, Sir William Scott announced the law applicable to such cases, as follows: 'The seizure was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a civil embargo, and so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there

pany of private individuals (Taix and Co.), some of whom were natives of France, and others of different countries, a monopoly of all the sulphur produced and worked in Sicily. This being a most valuable article of commerce, the throwing of the whole trade into the hands of a few favoured persons was a serious injury. Great Britain considered the grant of this monopoly a direct infraction of the stipulations of the Treaty of 1816. She accordingly remonstrated vigorously through the British Chargé d'Affaires, at the court of Naples, and in July, 1839, the King promised that the monopoly should be abolished; but more than half a year afterwards the King in council determined not to consent to the demands of Great Britain, and considered that the sulphur contract was not a violation of the Treaty of 1816.

The British Government immediately prepared to enforce its demands by sending orders to Admiral Sir R. Stopford, who commanded the fleet in the Mediterranean, to hold himself in readiness to commence active hostilities against the Neapolitan flag. This monopoly caused such a decline in the British trade in sulphur, that, although previously it was of the average value of 35,000*l.* per annum, it became, after the grant to the company, too small for a return to be made by the Customs. The increase in cost also was about 200 per cent. On April 17, the British ships of war, in the vicinity of Naples, commenced hostilities, and captured a number of Neapolitan vessels; and an embargo was laid on all vessels in the ports of Malta that bore the Sicilian flag. This caused the dissolution of the monopoly.—*Ann. Reg.*, 1840.

In 1847, Lord G. Bentinck moved, in the House of Commons, for redress against the Spanish Government to recover the debts due to the British holders of unpaid Spanish bonds, who held to the amount of 46,000,000*l.* He hinted that reprisals should be issued against Spain. The Secretary for Foreign Affairs (Lord Palmerston), while agreeing in principle, resisted the motion on the grounds of expediency and policy. He stated that it was true that the Spanish Government was base, had broken its engagements and never fulfilled its pledges, that it had squandered its resources, and allowed its revenues to be plundered; but he entreated the House not to impose upon the British Government the obligations which the proposal would throw on it. He warned foreign governments that if they did not make proper efforts to fulfil their engagements, the Government might be compelled to depart from the established practice of England, and to insist upon the payment of debts. It had the means of enforcing the rights of British subjects, nor would it for ever remain patient under the wrong.—*Parl. Debate*, 1847. See also case of the Silesian Loan, p. 492.

is a declaration of the *animus* by which it is done; that it was done *hostili animo*, and it is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem by any amicable alteration of their measures. This is the necessary course, if no compact intervenes for the restoration of such property, taken before a formal declaration of hostilities.<sup>1</sup>

§ 28. The right of granting reprisals, or of authorising seizures and embargoes, is vested in the sovereign, or supreme power of the State. It being little short of the right to carry on war, it is usually conferred only by the war-making power of the State. This, however, is regulated by municipal law. The English statute (4 Henry V., cap. 7) declared that 'the king will grant marque in due form to all that feel themselves grieved.' The marine ordinance of Louis XIV., of 1681, described the form to be observed in issuing letters of marque to French subjects. But these special reprisals, in time of peace, as has been already said, have almost entirely fallen into disuse. In case of general reprisals, the State duly authorises its officers and subjects by commissions, or by some general law or decree. Without such authority previously given, or its exercise subsequently ratified, by the supreme authority of the State, reprisals or seizures are not justified by the law of nations.<sup>2</sup>

§ 29. A State may authorise seizures and reprisals in favour of its own citizens, and for the redress of its own grievances, but not in favour of foreigners, or in an affair in which the nation has no concern.<sup>3</sup> In 1664, England granted

<sup>1</sup> The 'Boedes Lust,' 5 *Rob.*, 246; the 'Diana,' 5 *Rob.*, 60.

<sup>2</sup> Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 5; Martens, *Précis du Droit des Gens*, liv. viii. ch. ii. § 260; Emerigon, *Traité des Assurances*, ch. xii. sec. xxxv.; Bouchaud, *Théorie des Traités de Commerce*, ch. xiii. § 4; Rayneval, *Inst. du Droit de la Nat.*, etc., lib. ii. ch. xii.; Heffter, *Droit International*, § 110; Bello, *Derecho Internacional*, pt. i. ch. xi. § 3.

<sup>3</sup> Another kind of seizure, known as the *Jus angariae*, is mentioned by Hautefeuille, Massé, and other writers, as a right of a belligerent character, though exercised, strictly speaking, in time of peace. It is an act of the State by which foreign, as well as domestic, vessels, which happen to be within the jurisdiction of the State, are seized upon and compelled to transport soldiers, ammunition, or other instruments of war, and against their will to carry on hostilities against a Power with whom they are at peace. The owners of these vessels receive payment of freight beforehand.—See Phillimore, *Int. Law*, pt. iii., ch. 3.

During the Franco-Prussian war, 1870, the Prussian troops sank six British vessels in the river Seine. This act was defended by Prussia on



reprisals against the United Provinces in favour of the knights of Malta. On this subject the grand pensionary, De Witt, protested, saying: 'It is evident that no sovereign can grant or make reprisals, except for the defence or indemnification of his own subjects, whom he is, in the sight of God, bound to protect; but he never can grant reprisals in favour of a foreigner who is not under his protection, and with whose sovereign he has not an engagement to that effect, *ex pacto vel fœdere*. Besides, it is certain that reprisals cannot be granted except in case of an open denial of justice. Finally, it is also evident that, even in case of a denial of justice, he cannot empower his subjects to make reprisals until he has repeatedly demanded justice for them, and added, that in the event of a refusal, he will be obliged to grant them letters of marque and reprisal.' The court of France strongly condemned the conduct of the British admiralty in this case, and the king of England himself testified his disapprobation of it, and gave orders for the release of the Dutch vessels which had been seized by way of reprisal.<sup>1</sup>

§ 30. Valin is of opinion that the exception of foreigners does not apply to aliens domiciled in the country (*regnicola*), the State being bound to protect them, and to consider an injury done to them as an affront to its own sovereignty. Letters of reprisal may, therefore, issue not only to a subject by birth or naturalisation, but also to a foreigner domiciled in

the ground of military necessity, although, on the demand of the British Government, an indemnification was subsequently made.—*Parl. Papers*, 1871.

By the Civil Law, a King is justified in pressing into his service, or seizing ships of every description and of any nation, which may be found in his ports, for purposes of urgent necessity, but, nevertheless, a tacit condition of safe return is annexed to such seizure or pressing. By the ancient laws of England, the admiral might arrest any ship for the King's service, and after he or his lieutenant had made a return of the arrest in chancery, the owner of the ship could not plead against such return, because 'l'admiral et son lieutenant sont de record.'—Black Book, *Admir.*, fol. 28-29 and 157-158, 15 R. II., c. 3.

Further, it is evident, from the ancient writs and patents of England, that the Admiral, the wardens of the Cinque Ports, and others, were ordered to arrest and provide ships of war and other vessels, as well as to impress mariners, and collect provisions and arms for the defence of Great Britain.—And see *Rot. Scotiæ*, 10 E. III., m. 2-17, 34.

For a national defence in war, it is legal to pull down or injure the property of a private person: this is in accordance with the principle, *Salus populi suprema lex*.—See *Governors v. Meredith*, 4 Term R. 796.

<sup>1</sup> Bynkershoek, *De Foro Legat.*, cap. xxii. § 5; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xxiv.; Gardien, *De la Diplomatie*, liv. vi. sec. iii. § 2.

the country. This might be inferred from the rule of international law, which subjects the property of domiciled aliens to all the contingencies of the war, they being considered, in law, as the subjects of the State in which they are domiciled. Being themselves liable to reprisals against the country of their domicil, it would seem just that they be allowed to participate in their benefits.<sup>1</sup>

<sup>1</sup> Valin, *Traité des Prises*, p. 225 ; Valin, *Ord. de la M.*, i. iii., tit. x, Des Représailles.



## CHAPTER XV.

## JUST CAUSES OF WAR.

1. War should never be undertaken without just cause—2. Reasons and motives of a war—3. Justifiable causes of war—4. To secure what belongs, or is due to us—5. To punish an aggression—6. To protect ourselves from a threatened danger—7. Difficulty in ascertaining the real causes of a war—8. The aggrandisement of a neighbour not a just cause of war—9. Opinion of Grotius—10. Remarks of Kent—11. The motives of a war—12. Commendable motives—13. Vicious motives—14. Pretexts, or alleged reasons—15. Unjust wars always criminal—16. Opinions of the early Fathers of the Church on war—17. Dr. Wayland's objection that war is forbidden by the Bible—18. That even defensive war is not justifiable—19. That if moral suasion fail to prevent war, we must suffer the evil—20. That war is necessarily injurious to public morals—21. That its expenses exceed its benefits—22. That men, being rational beings, should never resort to force—23. That war fails to accomplish its object—24. That one party is necessarily in the wrong—25. That nations, like individuals, should refer their differences to some tribunal—26. That the benefits of a war are more than counterbalanced by its evils—27. Remarks of Dr. Leiber on war.

§ 1. 'WHOEVER,' says Vattel, 'entertains a true idea of war, —whoever considers its terrible effects, its destructive and unhappy consequences, will readily agree that it should never be undertaken without the most cogent reasons. Humanity revolts against a sovereign who, without necessity, or without very powerful reasons, lavishes the blood of his most faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them in the enjoyment of an honourable and salutary peace. And if to this imprudence, this want of love for his people, he moreover adds injustice toward those he attacks, of how great a crime, or rather of what a series of crimes, does he not become guilty? Responsible for all the misfortunes which he draws down upon his subjects, he is, moreover, loaded with the guilt of all those which he inflicts on an innocent nation. The slaughter of men, the pillage of cities, the devastation of provinces—such is the black catalogue of his enormities. He is respon-

sible to God, and accountable to human nature, for every individual that is killed, for every hut that is burned down. The violences, the crimes, the disorders of every kind, attendant on the tumult and licentiousness of war, pollute his conscience, and are set down to his account, as he is the original author of them all. Unquestionable truths! alarming ideas! which ought to affect the rulers of nations, and all their military enterprises, and inspire them with a degree of circumspection proportionate to the importance of the subject! The foregoing words of Vattel, remarkable for the age in which they were written, are well worthy the consideration and study of the statesmen and rulers of our own time.<sup>1</sup>

§ 2. The reasons which determine a nation to undertake a war are divided, by publicists, into two distinct classes: those which relate to the *right* to make the war, and those which relate to the *expediency* or propriety of doing so. The former are called the *causes* of the war, and the latter the *motives*; these causes may be *justifiable* or *unjustifiable*, and the motives may be *commendable* or *vicious*. The distinction has not always been observed by publicists and historians, and we not unfrequently find reasons alleged as *causes* of a war which were only *motives* or mere *pretexts* for undertaking it.

§ 3. The *justifiable causes* of a war are injuries received or threatened. There must be a strong probability that the threat may be attempted to be carried into execution, as mere empty words will seldom justify us in declaring war. It is not necessary that the injury should be material or physical, as a national insult is often as injurious as the robbery of a province. The justifiable objects of a war may, therefore, be divided into three classes or sub-divisions: 1st. to secure what belongs or is due to us; 2nd. to provide for our future safety by obtaining reparation for injuries done to us, and 3rd. to protect ourselves and property from a threatened injury. We will consider each of these classes separately.<sup>2</sup>

§ 4. *First*, of wars undertaken to secure what belongs or is due to us. We have shown, in the preceding chapter, that the party in possession has a right to retain his possession till the other claimant shows a clear and valid title to the thing in

<sup>1</sup> Vattel, *Droit des Gens*, liv. iii. ch. iii. § 24.

<sup>2</sup> Paley, *Moral and Pol. Philosophy*, b. vi. ch. xii.; Phillimore, *On Int. Law*, vol. iii. § 49; Bello, *Derecho Internacional*, pt. ii. cap. i. § 3; Real, *Science du Gouvernement*, tome v. ch. ii. sec. ii. § 6.



dispute ; and if, before proving such title, he should attempt to oust the actual possessor by force, the latter may employ force to resist the attack. So, if the latter be removed from his possession by fraud or surprise, or violence, he may employ force to recover it ; but if the former shows a clear and valid title to the thing in dispute, and has first resorted to the amicable modes of settling the question upon an equitable footing, and has been refused all reasonable modes of adjustment, he may be justified in resorting to force for the recovery of what really and truly belongs to him, and is unjustly withheld by his opponent. The burthen of proof, in such cases, rests upon the party who makes the seizure or attack, and he is bound to show, not only that the thing seized is clearly and indisputably his, but, also, that all amicable modes of recovery, or adjustment, had been tried without effect ; in fine, that justice had been absolutely denied him, and could be obtained only by a resort to war.<sup>1</sup>

§ 5. *Second*, of wars undertaken to provide for our future safety, by obtaining a reparation of injuries done to us. We have stated, in a former chapter, that a sovereign State is not liable to *punishment* in the strict technical sense of that term ; but that, where one State is injured or insulted by another, the former may require not only indemnity for the past, but security for the future, by making war upon the aggressor. This is regarded, in ordinary language, as a *punishment* for the offences committed, and is intended to prevent their recurrence. But, in public law, it is considered in the light of a reparation of injuries received, and as an act of self-defence in providing for future security. A war, undertaken for such a cause, must be limited to the object in view ; beyond this, it is unjustifiable. It is proper to remark here, that an injury done to a citizen of the State, is an injury to the whole State, for it is the duty of every State to maintain the security and welfare of all its citizens, and this obligation gives to it the right to make war upon any one from whose unlawful conduct they have suffered injuries, which the aggressor refuses to repair.<sup>2</sup>

§ 6. *Third*, of wars undertaken to protect ourselves and

<sup>1</sup> De Felice, *Droit de la Nat., etc.*, tome ii. lec. xxi.

<sup>2</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. xx. § 38 ; Rutherford, *Institutes*, b. ii. ch. ix. § 11.

property from a threatened injury. Self-defence is not limited to the repelling of unjust violence ; if it be seriously threatened, we may resort to such forcible measures as may be necessary to prevent its occurrence. It is not required of a State that it wait till an injury is actually received, and then make war to obtain reparation ; it is its duty to provide against the threatened danger, by making war, if needs be, upon the threatening party, in order to deprive him of the means of inflicting the injury.

§ 7. The causes of war are sometimes of such a mixed character that it is difficult to distinguish between what is justifiable and what is not. As already stated, a war which is offensive in its military character, may, or may not, be for justifiable causes, according to the necessities of the case ; for, as both nature and morality forbid our resorting to physical force to redress our wrongs, till we have tried the milder modes of procuring justice, without success, all the circumstances of each particular case must be taken into consideration before we can fully determine the character of the causes which induce the undertaking of such a war. Sometimes, however, the cause is single, and its character may be determined directly and without relation to the attending circumstances, or to the measures previously resorted to in order to obtain satisfaction.

§ 8. Of this class are wars undertaken simply for the purpose of weakening another State, whose power, if allowed to increase, we have good reason to believe, will be used to our injury. Here the question arises, how serious must be the danger to our own safety to constitute a justifiable cause for our taking up arms to prevent the aggrandisement of a neighbour ? This question is discussed, at considerable length, and with great clearness, by Vattel. 'On the one hand,' he says, 'a State that increases her power by all the arts of good government, does no more than what is commendable ; she fulfils her duties toward herself, without violating those which she owes to other nations. The sovereign, who, by inheritance, by free election, or by any other just and honourable means, enlarges his dominions by the addition of new provinces, or entire kingdoms, only makes use of his right without injuring any person. How then can it be lawful to attack a State which, for its aggrandisement, makes use only of lawful



means? . . . On the other hand, it is but too well known, from sad and uniform experience, that predominating powers seldom fail to molest their neighbours, to oppress them, and even totally subjugate them, whenever an opportunity occurs and they can do it with impunity. Europe was on the point of falling into servitude for want of a timely opposition to the growing fortune of Charles V. Is the danger to be waited for? Are we to allow the aggrandisement of a neighbour, and quietly wait till he makes his preparations to enslave us? Will it be a time to defend ourselves when we are deprived of the means? Prudence is a duty incumbent on all men, and most pointedly so on the heads of nations as being commissioned to watch over the safety of the whole people.' Having thus stated both sides of the question, he proceeds to give us the following solution. Since war is justifiable only where we have actually suffered an injury, or are visibly threatened with one, the increase of power in a neighbour cannot, alone and of itself, give us a right, under the law of nations, to take up arms in order to oppose it. But power alone does not threaten an injury, it must be accompanied by the will to do an injury, and that will must be clearly manifested, before we can resort to so terrible an expedient. If the State, receiving a formidable accession of power, has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of just suspicion to her neighbours, whose duty it is to stand on their guard against her. Moreover, they may demand securities, and if she refuses to give any, this may constitute additional evidence that she meditates injury. And when this design is *clearly* and *unmistakably* manifest, and all other modes of warding off the threatened danger fail, war becomes inevitable.<sup>1</sup>

§ 9. Grotius not only declares, as unjustifiable, a war undertaken through a 'fear of our neighbour's increasing strength,' without a moral certainty that such strength will be used to our injury, but is of opinion that in all dubious questions we are bound to resort to milder means to settle difficulties and remove apprehensions. He enumerates several causes which had been deemed sufficient to justify a declaration of war, and most of them as entirely unsatisfactory, and concludes that 'war is a matter of the weightiest importance, and by it

<sup>1</sup> Vattel, *Droit des Gens*, liv. iii. ch. iii. §§ 42-49.

the innocent suffer a great many afflictions, and, therefore, peace should be the end at which all our councils ought to aim.'<sup>1</sup>

§ 10. The remarks of Chancellor Kent upon this question are equally just and appropriate. He adopts the opinions of Grotius, and 'condemns the doctrine, that war may be undertaken to weaken the power of a neighbour, under the apprehension that its further increase may render him dangerous. This would be contrary to justice, unless we were morally certain, not only of a capacity, but of *an actual intention* to injure us. We ought rather to meet the anticipated danger by a diligent cultivation and prudent management of our own resources. We ought to conciliate the respect and good-will of other nations, and secure their assistance, in case of need, by the benevolence and justice of our conduct. War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself.'<sup>2</sup>

§ 11. As has already been remarked, it is not sufficient, in the forum of conscience, that we have just grounds for war, or that its objects are justifiable; we must, also, have good and proper *motives* for undertaking it. Thus, we may have received injuries, and suffered aggressions from another nation, which would, in themselves, have constituted good and sufficient reasons for declaring war against it, but, through fear or policy, we have not done so. In the meantime, the State from which we received the injury may have been so humbled or reduced as to be utterly unable, either to repeat the aggression or to recompense us for the harm it formerly did us. What motive have we now for declaring war against that State? Solely that of *revenge*, which can be considered neither good nor proper. The motives of a war are divided, as already stated, into two classes: 1st. *Commendable*, and 2nd. *Vicious*.<sup>3</sup>

§ 12. *Commendable motives* are derived from the good of the State and the protection of the people. If the motive for the war is to prevent an injury, or to repair one by obtain-

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. ii. caps. xxii., xxiii.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 48.

<sup>3</sup> Gardien, *De la Diplomatie*, liv. vi. § 5; De Felice, *Droit de la Nat.*, etc., tome ii. lec. xxi.



ing a just satisfaction, or to provide for our future safety by obtaining a reparation for an injury done, or to recover a right of which we have been unjustly deprived, it is both proper and commendable. And when a war is undertaken from such a motive, and for a justifiable cause, we have not only justice on our side, but the sympathies of all good men, for

‘Thrice is he armed who has his quarrel just.’

But although a war might be undertaken for commendable motives, the motives of its continuance may be very different. It may be commenced to prevent or repair an injury, but continued for the purposes of revenge or conquest. Thus, the Samnites had given Rome just cause of war by ravaging the lands of her allies. But when the former had offered full reparation for the damages, and every reasonable satisfaction, the latter, bent on conquest, refused to accept the offers of the Samnites, or to be appeased by their submissions.<sup>1</sup>

§ 13. *Vicious motives* are not derived from the good of the State or the protection of its citizens, but from the suggestions of evil passions. Such are the motives which spring from unbridled and wicked ambition,—the arrogant desire for command, the ostentation of power, the thirst for riches, the avidity of conquest,—from jealousy, hatred and revenge. In the words of Vattel: ‘If a nation, on an injury done to her, is induced to take up arms, not by the necessity of procuring a just reparation, but by a vicious motive, she abuses her right. The viciousness of the motive tarnishes the lustre of her arms, which might otherwise have shone as the cause of justice; the war is not undertaken for the lawful cause, which the nation had to undertake it; that cause is now no more than a pretext.’<sup>2</sup>

§ 14. *Pretexts* are the reasons which are alleged in justification of a war, when the real motives are different. Thus, the true cause of the war which Greece undertook against the Persians, was the experience she had had of their weakness; while the pretext alleged by Philip, and by Alexander after him, was the desire of avenging the injuries which the Greeks had so often suffered, and of providing for their future safety.

<sup>1</sup> Leibner, *Political Ethics*, b. vii. ch. iii. § 23.

<sup>2</sup> Vattel, *Droit des Gens*, liv. iii. ch. iii. §§ 30, 31.

'Pretexts,' says Vattel, 'are at least an homage which unjust men pay to justice. He who screens himself with them, shows that he still retains some sense of shame. He does not openly trample on what is most sacred in human society; he tacitly acknowledges that a flagrant injustice merits the indignation of all mankind.'<sup>1</sup>

§ 15. All modern ethical writers regard an *unjust* war as not only immoral, but as one of the greatest crimes—murder on a large scale. Such are all wars of mere ambition, engaged in for the purpose of extending regal power or national sovereignty; wars of plunder, carried on from mercenary motives; wars of propagandism, undertaken for the unrighteous purpose of compelling men to adopt certain religious or political opinions, whether from the alleged motives of 'introducing a more orthodox religion,' or of 'extending the area of freedom.' Such wars are held in just abhorrence by all moral and religious people; and it is becoming the settled conviction of the masses of all nations, that war should be undertaken only in cases of dire necessity and after all pacific measures have been exhausted.<sup>2</sup>

§ 16. Some of the early Fathers of the Church went so far as to adopt the principle, that war, *in any case and under any circumstances*, is unjustifiable, because contrary to the revealed will of God, and that all Christians were forbidden to bear arms. The consequence was that the Roman soldiers, who became converts to Christianity, deserted their flags in crowds, and some suffered martyrdom rather than continue in the military service. This extreme doctrine afforded the opponents of Christianity good ground for saying that it was destructive of civil government, and that a State composed of true Christians could not subsist. Moreover, it became evident that if Christians were not permitted to use arms in self-defence, they must all perish by the incursions and invasions of the barbarians. The question was referred to Saint Augustin, the most learned Father in the East. His answer was: 'If the Christian law had forbidden all wars, it would have been said to the soldiers who, in the Evangelist, asked the way of salvation, to throw away their arms and abandon the military service. But it had only been said to them: *Do violence to no man, neither accuse any falsely; and be content with your wages.*

<sup>1</sup> Vattel, *suprà*.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 49.



Let those who think Christianity opposed to the State form an army of such soldiers as our doctrine requires, and then let them dare to say that it is an enemy of the republic, or rather let them confess that, always obedient, it is the salvation of the republic.' The Church gave its sanction to this doctrine, and the councils pronounced excommunication against those who deserted, even in time of peace. The various objections to war made by the earlier Fathers of the Church, have been often repeated by modern writers on moral science, and more recently Dymond, Wayland, and others, have pressed them upon the public with great zeal and eloquence. We propose a brief summary of these objections to war, and of the answers which have been made to them. The arguments of Dr. Wayland, which are mostly copied from Dymond's Essays, are given in brief space, and in more moderate and temperate language than that used by most of his followers. We shall copy his own words so far as our limits will permit.<sup>1</sup>

§ 17. Dr. Wayland's first objection is, that 'all wars are contrary to the revealed will of God.' But in this assertion he assumes what is to be proved. There is no direct prohibition of war in the Bible. In the Old Testament we find war, in some cases, positively commanded; and in the New Testament there is not a word against the lawfulness of war. On the contrary, the soldier was told to be content with his wages. Again, he says: 'God commands us to love every man, alien or citizen, Samaritan or Jew, as ourselves,' and, from this, infers that inasmuch as we are to love all men as ourselves, we are forbidden, as a nation, to engage in war. To this it is answered, that we are nowhere commanded to love all men in the same degree, for Christ had his *beloved* disciple, one whom he loved pre-eminently and above all the others, though he loved the others none the less on that account. Again, this command, taken literally and as construed by Dr. Wayland, would render sinful the best affections of our nature,—those which we bear for our parents, our wives and children, for our

<sup>1</sup> Neander, *Hist. of Ch. Religion and Church*, Torrey, trans. vol. i. p. 272; Origenes, *Opera c. Celsus*, v. xxxiii.; Tertullian, *Opera, De Jud.*, xix.; *De la Corona*, c. xi.; St. Augustinus, *Opera, Epist.*, pp. 136-238; St. Athanasius, *Opera*, lib. ii. p. 960; St. Basilus, *Opera, Epist. ad Amphil.*, can. viii.; *Council of Arles*, can. iii.; Gibbon, *Decline and Fall of the R. Empire*, ch. xliii.; St. Polinus, *Opera, Epist.* xxv.

kindred and our countrymen. Moreover, the use of force to resist an attack or punish an offence, is by no means opposed to the command of love to all mankind. We resist the murderer and the robber, and we punish them for crimes and offences committed, but these acts do not imply *hate* or *revenge*. So it is in war, the soldier has no personal malice against his opponent.

§ 18. Dr. Wayland next considers the question, whether we may engage in war for self-defence, and concludes that, to forcibly repel the attack of another nation, would be establishing the principle that it is 'for the advantage of him who lives among a community of thieves, to steal, or for him who lives among liars, to lie.' My living among thieves would not justify me in stealing, nor would it be any reason why I should neglect the security of my property, or leave the thief unpunished. Our living among nations who carry on unjust wars would not justify us in doing so, nor should it prevent us from repelling or punishing those who wage an unjust war against us. The argument used against war, equally applies against the prevention and punishment of individual offences and crimes.

§ 19. Dr. Wayland admits that, however just and benevolent a nation may be, its moral character will not always protect it from the aggression of others, but he adds: 'If this method (that is, moral suasion), fail, why then let us suffer the evil.' This maxim, if applied to its full extent, would be subversive of all right, and soon place all power in the hands of the worst men in the community, and of the worst nations that inhabit the world. Reason with the robber and murderer, and if they will not desist, why then let them take our property and the lives of our families! Reason with the foreign nations who invade our soil, and if they will not desist, why then let them destroy our government and reduce us to slavery! But says the Doctor: 'I believe the aggression, from a foreign nation, to be an intimation from God that we are disobeying the law of benevolence, and that is his mode of teaching nations their duty, in this respect, to each other. So that aggression seems to me in no manner to call for retaliation and injury, but rather, for special kindness and good-will.' This is certainly carrying the principle of non-resistance very far; we are not only to suffer the evil, but to thank the evil-



doer, for thus reminding us of our forgetfulness of the law of benevolence!

§ 20. Again, it is argued that war necessarily begets immorality, and 'that the cultivation of a military spirit is injurious to the community, inasmuch as it aggravates the source of the evil, the corrupt passions of the human heart.' The correctness of this statement is denied, for war is not necessarily demoralising. Unjust war results from immoral causes, and is generally injurious in its moral effects upon society. The same may be said of unjust litigation. But suppose that all wars and all courts of justice were abolished, and nations, as well as individuals, were suffered to commit injuries with impunity, would not immorality and vice increase, rather than diminish? Few events rouse and elevate the patriotism and character of a nation more than a just and patriotic war. Such was the Dutch war of independence against the Spaniards, the German war against the aggressions of Louis XIV., the French war against the coalition of 1792, and the war of the American revolution.<sup>1</sup>

§ 21. With respect to 'pecuniary expenditure,' it is not to be denied that wars, and the means of military defence, have cost vast sums of money; so, also, have litigation, and the means deemed requisite in all civilised countries, in all ages, for maintaining justice between individuals. If these vast sums of money are necessary to secure justice between individuals of the same nation, can we expect that the means of international justice can be maintained without expenditure commensurate with the object in view? If we cannot rely exclusively upon the 'law of active benevolence,' for maintaining justice between brothers of the same country, can we hope that, in the present state of the world, strangers and foreigners will be more ready to comply with its requisitions?

§ 22. Again, it is objected to war, that men, being rational beings, should contend with one another by argument, and not by force, as do the brutes. To this it is answered, that force properly begins only where argument ends. If he who has wronged me cannot be persuaded to make reparation, I apply to the court, that is, to legal force to compel him to do me

<sup>1</sup> Wayland, *Moral Science*, b. ii. p. ii. d. ii. ch. iv.; Dymond, *Essay on Morality*, c. iii. ch. xix.; Leibner, *Political Ethics*, b. vii. § 20; Paley, *Moral and Pol. Philosophy*, b. iii. pt. ii. ch. x.; b. vi. ch. xii.; Halleck, *Elem. Military Art and Science*, ch. i. pp. 22, 23.

justice. So ought we to resort to *military* force only when all other means fail to prevent aggression and injury. War should always be the last resort of nations, the *ultima ratio regii*.<sup>1</sup>

§ 23. But it is objected to war, that it does not accomplish the object for which it is used, because it often fails to procure a redress of grievances, or to prevent repeated and continued aggression. So does a resort to civil force, but such a resort is none the less proper and just on that account. The uncertainty of litigation is proverbial. The injured party often fails to procure a redress of his grievances, and the aggressor is not unfrequently triumphant. Moreover, even if successful in his suits, the injured party often loses more than he gains pecuniarily by litigation, and, after all, he fails to prevent a repetition of the aggression. But would any sane man say that, for this reason, all litigation and courts of justice should be abolished? In civil, as well as in military life, the innocent party is sometimes the sufferer.<sup>2</sup>

§ 24. But, it is said, in all wars one party must be in the wrong, and frequently the war is unjust on both sides. Precisely so in suits at law; one party is necessarily wrong, and frequently both resort to the civil tribunals in hopes of attaining unrighteous ends. But for this reason must all courts of law be abolished, and no one be allowed to resort to the civil tribunals to procure a redress of grievances? Must individuals in civil life rely solely upon the 'law of active benevolence,' for the security of their persons and property, and shall all wrong-doers and criminals go 'unwhipt of justice'? This is the legitimate consequence of the argument.<sup>3</sup>

§ 25. But, it is said, nations do not resort to civil tribunals, like individuals, to settle their differences, but resort to brute force, to war; for the reason that it is believed a tribunal of this character—a *congress of nations*—for the settlement of international differences, would be productive of more evil than good. By such an arrangement, the old and powerful nations of Europe would acquire the authority to interfere in the domestic affairs, and control the influence and power of the weaker States. Republics, and governments founded on

<sup>1</sup> Hooker, *Eccles. Pol.*, b. i. § 10.

<sup>2</sup> Phillimore, *On Int. Law*, vol. iii. § 50; Burke, *Letters on a Regicide Peace*, vol. viii. p. 181.

<sup>3</sup> Vattel, *Droit des Gens*, liv. iii. ch. iii. § 39.



popular sovereignty, could never act in unison with those of kings and despots. Moreover, such a tribunal would not prevent war, for military force would still be resorted to to enforce its decisions. For these, and other reasons, it is deemed better and safer to rely on the present system of international law. Under this system, and with a constitutional government of limited and divided powers, a resort to the arbitrament of war is not the result of impulse and passion, a yielding to the mere 'bestial propensities' of our nature; it is usually, in such governments, the deliberate and solemn act of the legislative power, of the representatives of the national mind, convened as the high council of the people.<sup>1</sup>

§ 26. Again, it is said that the benefits of war are more than counterbalanced by the evils it entails, and that, 'most commonly, the very means by which we repel a despotism from abroad, only establishes over us a military despotism at home.' Much has been said and written about *military* despotism, but we think he who studies history thoroughly, will not fail to prefer a military despotism to a despotism of mere politicians. The governments of Alexander and Charlemagne were infinitely preferable to those of the petty civil tyrants who preceded and followed them; and there is none so blinded by prejudice as to say that the reign of Napoleon was no better than that of Robespierre, Danton, and the other 'lawyers' who preceded him, or of the Bourbons, for whom he was dethroned. We could point to numerous instances where the benefits of war have more than compensated for the evils which attended it; benefits not only to the generations who engaged in it, but also to their descendants for long ages. Had Rome adopted the non-resistance principle when Hannibal was at her gates, we should now be in the night of African ignorance and barbarism, instead of enjoying the benefits of Roman learning and Roman civilisation. Had France adopted this principle when the allied armies invaded her territories, in 1792, her fate had followed that of Poland. If the United States had adopted this principle in 1776, what would now be the character and condition of America?

§ 27. We have thus noticed, in detail, the various arguments against war used by the advocates of non-resistance, not because the arguments themselves have any real founda-

<sup>1</sup> Legare, *Rep. House of Rep.*, June 13, 1838.

tion or force, but on account of the character and influence of their authors, and the effect they apparently produce, not only upon religious enthusiasts, but also upon many Christian philanthropists. Such arguments need only to be examined to convince us of their weakness and absurdity, however plausible they may appear at first sight.<sup>1</sup>

We cannot better terminate this chapter than by quoting the following peculiarly just and appropriate remarks of Dr. Leibner, on the influence and character of war: 'The continued efforts,' he says, 'requisite for nations to protect themselves against the ever-repeated attacks of a predatory foe, may be infinitely greater than the evils entailed by a single and energetic war, which forever secures peace from that side. . . . No human mind is vast enough to comprehend in one glance, nor is any human life long enough to follow out consecutively, all the immeasurable blessings, and the unspeakable good, which have resulted to mankind from the ever-memorable victories of little Greece over the rolling masses of servile Asia, which were nigh sweeping over Europe like the high tides of a swollen sea, carrying its choking sand over all the germs of civilisation, liberty, and taste, and nearly all that is good and noble. . . . Wars have frequently been, in the hands of Providence, the means of disseminating civilisation, if carried on by a civilised people—as in the case of Alexander, whose wars had a most decided effect upon the intercourse of men and extension of civilisation—or of rousing and re-uniting people who had fallen into lethargy, if attacked by less civilised and numerous hordes. Frequently we find, in history, that the ruder and victorious tribe is made to recover, as it were, civilisation, already on the wane, with a refined nation. Paradoxical as it may seem at first glance, it is, nevertheless,

<sup>1</sup> A defensive war is always lawful, but an offensive war demands a serious and just cause, such as the public good, preservation of order, recovery of things unjustly abstracted, repression of rebels, and defence of innocent people.—Laym., lib. ii., t. iii., c. xii.; Mol., t. i., d. 114; Dian., p. 6. t. 4 r. 3; and St. Thomas Aquinas, 22, qu. 40, art. i.

But a subject is morally bound to wage war at the command of his prince, without enquiry into the justice or injustice of the war, unless he is (which is hardly possible) absolutely aware of its injustice.—Lugo, d. 18; *De Just.*, s. i., n. 21; Sanchez, *Dec.* l. vi. c. iii. n. 15; Salmer, *De quint. præc.*, c. viii. punct. 3, § i. n. 29.

A person not bound to fight (*i.e.* a volunteer or a mercenary), should carefully enquire into the merits of a war before offering his services.—Mol. d. 113, n. 171; Dian. t. ii. tract. v. misc. r. 96.



amply proved by history, that the closest contact, and consequent exchange of thought and produce, and enlargement of knowledge, between two otherwise severed nations, is frequently produced by war. War is a struggle, a state of suffering; but as such, at times, only that struggling process without which,—in proportion to the good to be obtained, or, as would be a better expression for many cases, to the good that is to be born—no great and essential good falls ever to the share of man. Suffering, merely as suffering, is not an evil. Our religion, philosophy, every day's experience, prove it. No maternal rejoicing brightens up a mother's eye, without the anxiety of labour.<sup>1</sup>

<sup>1</sup> Leiber, *Political Ethics*, b. vii. §§ 20, 21; Halleck, *Elem. Mil. Art and Science*, ch. i. pp. 32, 33; for opinions of Grotius on the subjects of this chapter, *vide* his work, *De Jur. Bel. ac Pac.*, lib. i.; lib. ii. caps. i. xx. and lib. iii. cap. v.

## CHAPTER XVI.

## DIFFERENT KINDS OF WARS.

§ 1. Definition of war—2. Divisions made by military writers—3. By historians—4. By publicists—5. Wars of insurrection and revolution—6. Wars of independence—7. Wars of opinion—8. Wars of conquest—9. Civil wars—10. National wars—11. Wars of intervention—12. Armed intervention is war—13. For the preservation of the balance of power—14. Historical examples—15. Intervention of allies between Russia and Turkey in 1854—16. In internal affairs of States—17. Treaty of Paris and Congress of Vienna in 1814 and 1815—18. British views of armed intervention—19. Intervention by reason of treaty obligations—20. By invitation of the contending parties—21. To stay the effusion of blood—22. For self-defence—23. Public wars—24. Private wars—25. Mixed wars—26. Perfect and imperfect wars—27. Solemn and non-solemn wars—28. Effect of subsequent ratification—29. Lawful and unlawful wars—30. Distinction between unlawful and unjust wars—31. Individual liability for acts of hostility.

§ 1. WAR has been defined, 'A contest between States, or parts of States, carried on by force.' This definition is by some considered defective, and as excluding that class of civil wars which are sometimes carried on between families and factions which do not constitute either States or organised parts of States, like the wars of the Guelphs and Ghibelines in Italy, the guerilla wars in Spain, and the wars of factions in Mexico and South America. But a close examination into the origin and nature of these wars will show that they are, in most cases, waged by organised parts of a State, and have reference to some principle of internal organisation or party supremacy.

§ 2. Wars have been divided into different classes, according to the views and professions of those who discuss them. Military writers, generally, consider them in relation to the military operations which are carried on, and, therefore, divide them into *offensive* and *defensive* wars. But these terms are here used in a very different sense from that in which they are usually employed by political and ethical writers; for a war may be essentially defensive in its political and moral charac-



ter, even where we begin it, if intended to prevent an attack or invasion, which is under preparation. A nation which first incites the war is the real offender, by its aggression on the rights of others, although, as a matter of policy, it may confine itself to operations which are, in a military point of view, merely defensive. Hence wars, which are entirely offensive in their military character, are sometimes essentially defensive in their nature and origin, and *vice versa*.<sup>1</sup>

§ 3. But historians and publicists have generally divided wars according to their origin, objects, and effects, having reference also to the character of the parties which engage in them. Thus, historians have classified these contests, as *wars of intervention, wars of insurrection or of revolution, wars of independence, wars of conquest, wars of opinion, religious wars, national wars, and civil wars*. They have also classified them according to the general theatre of military operations, as land wars and maritime wars; or as Asiatic, African, European, and American wars. Again, they are sometimes divided, with respect to periods of time or of history, as ancient and modern wars, or wars of antiquity, of classic history, of the middle ages, and of recent times. The exact periods of these several divisions are not definitively fixed, nor are the divisions themselves of much importance in international jurisprudence, except that it is to be remembered that the rules of international war, adopted at one period, may not be applicable to another period.<sup>2</sup>

§ 4. Publicists, on the other hand, have divided and classified these contests with reference to the affairs of State, the legal *status* of the parties engaged in them, and the international rights and obligations which result from them. Thus, text-writers usually classify them as public or *solemn wars, perfect wars, and imperfect wars, mixed wars, the non-solemn kind of wars*, and acts of hostility not followed by actual war, but governed by the laws of war. Such classification is of little importance, except so far as it may be necessary to distinguish between the rules applicable to particular cases. These distinctions, however, are sometimes adhered to with great tenacity, and argued with great learning in diplomatic

<sup>1</sup> Jomini, *Précis de l'Art de la Guerre*, ch. i.; Halleck, *Elem. Military Art and Science*, ch. ii. p. 35.

<sup>2</sup> De Felice, *Droit de la Nat.*, tome ii. lec. xxii.

discussions of questions growing out of the hostile acts of particular States. We will now proceed to discuss these different kinds of wars, and the rights and duties peculiarly applicable to each.<sup>1</sup>

§ 5. *Wars of insurrection and of revolution*, are generally those undertaken to gain or to regain the liberty or independence of the party or State which undertakes them, as was the case with the Americans in 1776 against England; of the Mexicans and South American States against Spain; of the Greeks in 1821; and of the Hungarians in 1848, and the Italians in 1860. A war of revolution is generally undertaken for the dismemberment of a State, by the separation of one of its parts, or for the overthrow and radical change of the government; while an insurrectionary war is sometimes waged for a very different purpose. Both, however, have respect to the internal affairs of the State, rather than to its external relations. They are, therefore, in one sense civil wars, and are governed by the same general rules which are applied to that class of wars.<sup>2</sup>

§ 6. *Wars of independence* are those waged by a State against foreign dictation and control; such as the wars of Poland against Russia, of the Netherlands against Spain, of France against the several coalitions of the allied powers, of the Spanish Peninsula against France, of India against England, of Hungary against Austria, and of Turkey against Russia. The war of 1812, between the United States and England, partook largely of this character, and some judicious historians have denominated it the war of American independence, as distinguished from the war of the American revolu-

<sup>1</sup> Vattel, *Droit des Gens*, lib. iii. ch. i. § 2; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. §§ 6, 7; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. i.; Rayneval, *Inst. du Droit Nat.*, liv. iii. ch. ii.; Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. cap. vii.

<sup>2</sup> Taylor, *On Revolutions, etc.*, passim. It was held in the United States, in 1863, that the act of a foreign nation in recognizing the so-called Confederate States as a belligerent power, stopped its subjects from disputing the lawfulness of captures, made on the high seas, by the United States forces according to the laws of maritime warfare; but that such recognition did not determine the status of the person and property of rebels in the courts of the United States, those courts being guided in their adjudications relative to such persons and property by municipal and not by international law.—United States *v.* One hundred barrels of cement, 3 *Am. Law. Reg. N.S.*, 735.

A citizen of a State in insurrection, was held in the United States to have no *locus standi* in a court of that country to contest a prize seizure.—‘The D. Sargeant,’ *Blatchf. Pr. Cas.*, 576.



tion, by which the revolted colonies attained the position of a distinct and separate sovereignty.<sup>1</sup>

§ 7. *Wars of opinion* have been subdivided into two classes, *political wars* and *religious wars*. As examples of the former, we may mention those which the Vandeans have sustained in support of the Bourbons, and those France sustained against the Allies, as also those of propagandism waged against the smaller European States by the republican hordes of the French revolution. As examples of the latter, we may mention the Jewish wars, the wars of Islamism, those of the Crusades and of the Reformation. Religious wars are the most cruel and bloody, and are often carried on without any regard to the rules of international law. All wars of opinion are more cruel than those resulting from principle, policy or necessity.<sup>2</sup>

§ 8. *Wars of conquest* are those undertaken for the acquisition of territory and the extension of empire, like those of the Romans in Gaul and Britain, of the English in India, Africa, and America, of the French in Egypt and Africa, of the Spaniards in America, and of the Russians in Circassia and Turkey. The recent war of the United States against Mexico partook largely of the character of a war of conquest, at least in its prosecution. Hostilities were commenced by the Mexicans, and the Americans had suffered innumerable wrongs before the commencement of the war. And although the avowed object of the United States in engaging in the war was simply to obtain 'indemnity for the past and security for the future,' yet, as Mexico could offer no other indemnity, it was determined, from the beginning, to seize upon and retain a portion of her territory. In its essential features it was, therefore, a war of conquest. Such wars may, or may not, be justifiable, according to the circumstances under which they are undertaken.<sup>3</sup>

<sup>1</sup> Jomini, *Précis de l'Art de la Guerre*, ch. i.; Ingersol, *History of the Second War, etc., Int.*; Armstrong, *Notices of the War of 1812*, vol. i. ch. i. To which may be added the war of Italy, in 1866, against Austria for the possession of Venice.

<sup>2</sup> Laurent, *Droit des Gens*, tome iv. liv. iv. ch. i.; Stephen, *On History of France*, lecs. xv., xvi.

<sup>3</sup> Halleck, *Elem. Mil. Art and Science*, ch. ii. p. 36; Ripley, *Hist. War with Mexico*, vol. i. To these wars may be added, the war of 1866 by Prussia and Austria against Denmark, and the wars waged by Russia on her south-eastern frontier.

§ 9. *Civil wars* are those which result from hostile operations, carried on between different parts of the same State, as the wars of the roses in England, of the league in France, of the Guelphs and Ghibelines in Italy, and of the factions in Mexico and South America. Wars of insurrection and revolution are, in one sense, *civil wars*; but this term is more usually applied to those contests which are waged between rival families or factions, for party ascendancy in a State, rather than for its dismemberment, or for a radical change in its government. Each party, in such cases, is usually entitled to the rights of war as against the other, and, also, with respect to neutrals. Mere rebellions, however, are considered as exceptions to this rule, as every government treats those who rebel against its authority according to its own municipal laws, and without regard to the general rules of war which international jurisprudence establishes between sovereign States. As is shown elsewhere, every neutral State, in such a contest, must determine for itself when it will consider a party in rebellion, insurrection, revolution, or civil war, entitled to the rights of a belligerent in its international relations. Yet, it does this under its international responsibility to the State, previously recognised as sovereign, against which the rebel, insurgent, or revolutionary forces wage hostilities. To recognise every such force as a legitimate belligerent, and invest it with the rights and powers which international law confers upon a sovereign State, would be both unjust and insulting to the government of the State against which the rebellion or revolution is attempted; while, on the other hand, it might be equally unjust toward the other party, to refuse to concede to it any belligerent rights. Each case must be determined by its own peculiar circumstances, all foreign powers which wish to preserve their neutrality strictly observing the principle of non-interference.<sup>1</sup>

<sup>1</sup> Jomini, *Précis de l'Art de la Guerre*, ch. i. art. ix.; Leibner, *Political Ethics*, b. vii. § 23; Bello, *Derecho Internacional*, pt. ii. cap. x. § 1; Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. cap. xiv. The civil war in the United States, and the civil war in Spain are late instances.

It was held by the district court of Massachusetts, in 1862, that the United States may be engaged in war and have all the rights of a belligerent without any declaration of Congress; that in such a war it would be the duty of the President to exert all his power as commander-in-chief of the army and navy to capture or destroy the enemy; that the hostilities which were commenced by the Confederates against the Federal States constituted war; that in the civil war the Confederates were



§ 10. *National wars* are those where the great body of the people of a State take up arms and join in the contest, like those of the Swiss against Austria and the Duke of Burgundy, of the Catalans in 1712, of the Dutch against Philip II., of the Americans against England, of the Poles and Circassians against Russia, and of the Hungarians against Austria. A war may be a war of insurrection, or revolution, or independence, and, at the same time, a national war. Where such insurgent militia are called into the field, and organised under the constituted authorities of the State, they are entitled to all the rights of war, and are subject to all its duties and responsibilities.<sup>1</sup>

§ 11. *Wars of intervention* are those where one State interferes in favour of a particular State as against others, or in favour of a particular party, sovereign, or family in a State. This intervention is divided into two classes, according as it is made with respect to the *internal* or *external* affairs of a nation. The interference of Russia in the affairs of Poland, of England in the government of India, of Austria and the allied powers in the affairs of France during the revolution, and under the empire, are examples under the first head. The intervention of the Elector Maurice of Saxony against Charles V., of King William against Louis XIV. in 1688, of Russia and France in the Seven Years War, of Russia again between France and Austria in 1805, and between France and

at the same time belligerents and traitors, and subject to the liabilities of both; that the United States (Federal) sustained the double character of a belligerent and sovereign, and had the rights of both, their rights as belligerents being unimpaired by the fact that their enemies owned allegiance.—‘The Amy Warwick,’ 2 *Spr.* 123; ‘The Lilla,’ *ibid.* 177.

A civil war may exist, and be prosecuted on the same footing, as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open.—*Prize Cases*, 2 *Black.*, 635.

No formal declaration of war by the President of the United States was necessary to render lawful the means adopted by him to repel the warlike measures of the enemy (Confederate States) in 1861.—‘The Hiawatha,’ *Blatchf. Pr. Cas.*

The principle that the personal character, and disposition, of an individual inhabitant of hostile territory cannot be inquired into in questions of capture, applies as well in civil as in foreign wars. Hence all the people of any district that was in insurrection against the United States in the Southern rebellion were regarded as enemies, except in so far as by action of the Government itself that relation was changed.—Alexander’s Cotton, 2 *Wall.*, 404.

<sup>1</sup> The war of 1876, by Servia and Montenegro against Turkey, is an example of this.

Prussia in 1806, of France, Great Britain, and Sardinia, between Turkey and Russia in 1854, are examples under the second head.<sup>1</sup>

§ 12. We have pointed out in another chapter the distinction between pacific mediation and armed intervention. The former consists in advice, monition, persuasion, and those influences which result from character, power and wealth on one side, and friendship, respect, and, perhaps, a certain degree of dependence, on the other. Such influences may very properly be exerted in the preservation of peace, by bringing about an amicable arrangement of disputes between different States, or between opposing parties in the same State, provided they are not intended to weaken or destroy the State itself. *Armed intervention*, on the contrary, consists in threatened or actual *force*, employed, or to be employed, by one State in regulating or determining the conduct or affairs of another. Such an employment of force is virtually *a war*, and must be justified or condemned upon the same general principles as other wars. There are, however, certain rights and duties incident to this particular class of wars which require a separate discussion, distinguishing between the different kinds of intervention, or rather the grounds upon which they have been severally defended or condemned. Having discussed elsewhere the subject of pacific interference, as connected with the independence of States, we shall here consider only armed intervention, or the forcible interference of one State in the affairs of another.<sup>2</sup>

§ 13. One of the most common grounds of intervention, by force, is for *the preservation of the balance of power*; that is, to prevent the dangerous aggrandisement of any one State by external acquisitions so as to put in jeopardy the safety of others, or the general peace of nations. This right rests solely on self-defence, for no State would be justified in preventing the lawful acquisition of territory by another, unless such acquisition should directly or mediately affect its own safety. Thus, Hiero, king of Syracuse, sent aid to Carthage, deeming it necessary, as Polybius tells us, 'both in order to retain his dominions in Sicily, and to preserve the Roman friendship,

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. §§ 386 et seq.; Wheaton, *Hist. Law of Nations*, pp. 80-88. The intervention of Russia in the affairs of Turkey, in 1877, is another example.

<sup>2</sup> Vide *ante*, Chapter IV.



that Carthage should be safe, lest by its fall the remaining power should be able, without let or hindrance, to execute every purpose and undertaking. And here he acted with great wisdom and prudence, for that is never, on any account, to be overlooked, nor ought such a force ever to be thrown into one hand, as to incapacitate the neighbouring States from defending their rights against it.<sup>1</sup>

§ 14. It was on this principle that the Italians urged the European powers to intervene against the aggrandisement of Charles VIII. of France, when he undertook the invasion and conquest of Italy. Again, it was in support of this maxim of international law, against the aggrandisements of the Emperor Charles V., that Francis I., of France, actually concluded a treaty of alliance with the Turks (the first treaty ever contracted between a European sovereign and the Porte); and that Roman Catholic France supported, with one hand, the Protestants of Germany in their long and successful opposition to the aggressions of the imperial power, while with the other, and that a hand of iron, she sought to crush the Protestant subjects of her own land.<sup>2</sup>

§ 15. A recent example of a war of external intervention is that of England and France in 1854, against Russia, in defence of European Turkey, and to prevent the aggrandisement of the empire of the Czar, by the absorption of a large portion of the Ottoman territory. Russia based her attack upon Turkey on the ground of protecting the rights of the Greek Church, but this was evidently a mere pretext and excuse. It was, on her part, virtually a war of conquest, and of national aggrandisement, and the western powers intervened to check her vast and rapidly increasing military preponderance. Their efforts have been partially successful; and if they have not prevented, they have at least postponed an event of which they had been forewarned by the sagacious and far-seeing policy of the great Napoleon. The Italian war of 1859 was, on the part of France, partly a war of intervention, and partly a war for the defence of an ally.<sup>3</sup>

§ 16. The principle of the *preservation of the balance of*

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. § 396; Hume, *Essays*, vol. ii. p. 323.

<sup>2</sup> D'Aubigné, *Hist. of the Reformation*, b. xii.

<sup>3</sup> Phillimore, *On Int. Law*, vol. i. §§ 339 et seq.; De Cussy, *Précis Historique*, ch. xii.

*power*<sup>1</sup> has been resorted to as a justification for forcible intervention in the internal affairs of States, by connecting it with treaties of guarantee, and the pretended danger that internal changes in a single State might disturb a general peace. But this is seldom, if ever, a good and sufficient excuse for a resort to armed intervention in the internal affairs of another State, while it has afforded a pretext for numerous cases of international injustice and crime. Instead of preserving peace, its general tendency has been to produce wars, and to destroy what was intended to be preserved. Thus, the interference of Russia, Austria and Prussia, in the internal affairs of Poland, and the consequent spoliation of that kingdom, may be regarded as the legitimate cause of the aggressions of revolutionary France, and the wars of the consulate and empire, by which the equilibrium of Europe was entirely destroyed.

§ 17. The treaty of Paris, and the congress of Vienna (1814-15), sought to restore this equilibrium by the creation of large kingdoms and the absorption of small independent States. 'To effect this purpose,' says Phillimore, 'States were, in several instances, treated simply as containing so many square miles, and so many inhabitants, little or no regard being paid to national feelings, habits, wishes, or prejudices. The annexation of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, and the diminution of the territory of Saxony, were among the instances of grievous violations of international justice afforded by this treaty, and for which the preservation of the balance of power was the pretext and excuse; but the true and legitimate application of that principle would have been a league of protection of the greater with the smaller States. The policy which seeks to establish one principle of international law upon the ruin of others, has been, and always must be, a policy as fatal to the lasting peace of the world as the attempt to promote one moral duty, at the expense and by the sacrifice of others, is and must be fatal to the peace of an individual; *populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munita*.<sup>2</sup>

§ 18. Although Great Britain was a party to this coalition, and sanctioned the principle which tainted the treaty of Vienna, yet she expressed her emphatic dissent from the application

<sup>1</sup> See *ante*, Chapter IV.

<sup>2</sup> Phillimore, *suprà*.



of it to the *internal* changes of existing States, at the congresses of Trappau in 1820, of Laybach in 1821, and of Vienna in 1822, and, also, in Italian affairs in 1860. England, however, has generally supported the principle of intervention in the *external* affairs of States for the preservation of the balance of power, both in Europe and America, at least through the medium of treaty stipulations. On this ground, her military intervention in the affairs of Portugal, in 1826, was defended. And, in 1852-3, she attempted a tripartite treaty with France and the United States, to prevent the absorption, by the latter, of the Island of Cuba, an appendage of Spain, as a means of preserving the 'present distribution of power' in America. The United States refused to accede to the arrangement.<sup>1</sup>

§ 19. Another ground upon which wars of intervention have been attempted to be justified, is the obligations of treaty stipulations. These may have relation both to internal and to external affairs. The quadruple alliance of 1834, by which England and France intervened in the affairs of Spain and Portugal, to expel Don Carlos and Don Miguel from the territories of the two kingdoms, and the intervention of the western powers of Europe, in 1854, between Turkey and Russia, are examples of both these kinds of wars. The latter, however, was more properly an intervention to preserve the balance of power, and even the former was not altogether founded on treaty obligations. Wars of intervention are to be justified or condemned accordingly as they are, or are not, undertaken strictly as the means of self-defence, and self-protection against the aggrandisements of others, and without reference to treaty obligations, for, if wrong in themselves, the stipulations of a treaty cannot make them right.<sup>2</sup>

§ 20. Still another ground upon which wars of intervention have been justified, is the invitation of the contending parties. We have shown in a preceding chapter that pacific mediation may, where the mediating power acts the part of *an arbitrator*, sometimes properly lead to forcible intervention. Such intervention is not confined to conquests between sovereign States, but may be applied to cases of civil war, if the

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. § 399; *Cong. Doc.*, 32nd Cong., 2nd Sess. Senate, *Ex. Doc.*, No. 13.

<sup>2</sup> Phillimore, *suprà*.

State be really divided against itself, and there be two *bond fide* parties waging actual war against each other. It has well been said that 'no mere temporary outbreak, no isolated resistance to authority, no successful skirmish, is sufficient for this purpose; there should be such a contest as exhibits some equality of force, and of which the issue would be, in some degree, doubtful. In most cases, therefore, some time must elapse before an internal commotion can be clothed with the character of a revolution.' In case of a mere insurrection, which has not acquired the character of a revolution, the insurgents are not considered capable of negotiating with a foreign State, or of becoming a party to any agreement with respect to arbitration or foreign intervention. We have already stated that the invitation of one party to a civil war can afford no right of foreign interference, as against the other party. The same reasoning holds good with respect to armed intervention, whether between belligerent States, or between belligerent parties in the same State. Nevertheless, the invitation of one party is often put forward, in connection with other reasons, to justify armed intervention. Thus, the aid rendered by England, under Queen Elizabeth, to the revolted Netherlands against Spain, was based, not only on the ground of invitation by the Dutch, but also on that of protecting her Protestant subjects, and of checking the overshadowing power of Philip II. The interference of Great Britain, France, and Russia in the affairs of Greece was vindicated upon three grounds, viz.: 'First, of complying with the request of one party; secondly, of staying the effusion of blood; thirdly, and principally, of affording protection to the subjects of other powers who navigated the Levant.'<sup>1</sup>

§ 21. We have stated in another chapter that when a State is desolated by a protracted civil war, foreign interference, by way of pacific mediation, in order to stay the effusion of blood, is not only justifiable, but is sometimes a duty imposed by humanity. But will the general interests of humanity justify interference to the extent of a *war* of intervention? 'This ground of intervention,' says Phillimore, 'urged on behalf of the general interests of humanity, has been frequently put

<sup>1</sup> *State Papers*, Greece, 1826-1832, pp. 54, 55; Mackintosh, *Miscellaneous Works*, pp. 750 et seq.; De Cussy, *Droit Maritime*, liv. ii. ch. xxxvii.



forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it ; such, for instance, as the danger accruing to other States from the continuance of such a state of things, or the right to accede to an application from one of the contending parties. As an accessory to others, this ground may be defensible, but, as a substantive and solitary justification of intervention in the affairs of another country, it can scarcely be admitted into the code of international law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence.' As stated in the preceding paragraph, this reason occupied a prominent place among those alleged to justify the intervention of the allies between Turkey and her Greek subjects, in 1827. It also, undoubtedly, had its influence with other reasons, such as the general peace of Europe and the preservation of the balance of power, in justifying the intervention of Great Britain, Austria, Russia, Prussia, and France, in the Belgian revolution of 1830.<sup>1</sup>

§ 22. These various grounds upon which wars of intervention in the internal affairs of States were formerly attempted to be justified, are now abandoned by the best modern writers on international law, and the present rule is that stated in another chapter: 'No government has a right to interfere in the affairs of another government, *except in the case where the security and immediate interests of the first government are compromised.*' But this rule may seem vague and unsatisfactory, for who is to judge when internal security and independence is so threatened as to justify a resort to armed intervention ? This question must be resolved upon the general principles upon which war, in any case, is justified. There certainly could be no doubt in the case where one State establishes a form of government which is built upon professed principles of hostility to the government of every other country, and attempts, or prepares to attempt to force its dogmas upon others, thereby disturbing the peace of nations. 'It may be admitted,' says Phillimore, 'that Venice in 1298, Great Britain in 1649, France, both in 1789 and after the suc-

<sup>1</sup> Phillimore, *On Int. Law*, vol. i. §§ 394 et seq. ; *State Papers*, English, on Greece, 1826-32, p. 98 ; Hansard, *Parl. Debates*, vol. xxviii. pp. 1133-1163.

cession of the Cavaignac administration in 1848, and after the last revolution in 1851, were entitled, upon the principles of national independence, and without the intervention of foreign States, to make the great changes in their respective constitutions which were effected at those periods, because such changes concerned themselves alone. Why, then, cannot the same remark be applied to the French revolution in the year 1792? The answer is to be found in the decree promulgated by the Convention on November 19, 1792.' That decree not only authorised, but ordered the generals of the French armies to render succour and assistance to the citizens of all other States who wished to recover their liberty, or who were or might be troubled (*vexés*), for the sake of liberty. This declaration was regarded as a declaration of war, of the worst and most hateful kind, and those who had hitherto remained strictly neutral, now armed for 'that long, bloody, terrible, and universal war, which shook, not only Europe, but the world, to its centre, and of which the wounds are not yet healed.' The intervention of France and the allies in the internal affairs of Spain, in 1823, was attempted to be defended upon the same grounds as that of England and the allies in the affairs of France in 1792; but the cases were essentially different, and the plea of self-security was evidently a pretext rather than a justifiable reason. 'England,' said Mr. Canning, 'had made war against France, not because she had altered her own government, or even dethroned her own king, but because she had invaded Genoa, Savoy, and Avignon; because she had overrun Belgium, and threatened to open the mouth of the Scheldt in defiance of treaties; and because she openly announced and acted upon the determination to revolutionise every adjoining State.' But Spain, in 1823, had simply changed her constitution, limiting the power of the crown. She had not declared war against others, nor had she attempted either to seize or to revolutionise the territory or governments of other States. Nevertheless, a war of intervention was determined on, on account of the alleged danger from the spread of democratic principles, and France was supported in this determination by Austria, Prussia, and Russia; but the public voice of England was strongly opposed to the war, and although the ministry did not deem it proper to oppose this intervention by actual force, they did not fail to condemn it



in the strongest terms. Lord Brougham attacked the conduct of these powers in a speech of extraordinary power and vigour. 'To judge,' said he, 'of the danger of the principles now shamelessly promulgated, let everyone read attentively, and, if he can, patiently, the notes presented by Austria, Prussia and Russia to the Spanish Government. Can anything more absurd and extravagant be conceived? In the Prussian note the constitution of 1812, restored in 1820, is denounced as a system which, confounding all elements and all power, and assuming only the principle of a permanent and legal opposition to the government, necessarily destroyed that central and tutelary authority which constitutes the essence of the monarchical system.' The emperor of Russia, in terms not less strong, called the constitutional government of the Cortez, 'laws which the public reason of all Europe, enlightened by the experience of ages, has stamped with the disapprobation of the public reason of Europe.' What is this but following the example of the autocrat Catharine, who first stigmatised the constitution of Poland, and then poured her hordes to waste province after province, and finally hewed her way to Warsaw through myriads of unoffending Poles, and then ordered a *Te Deum* to be sung for her successes over the enemies of Poland.<sup>1</sup> Such doctrines, promulgated from such quarters, are not only menacing to Spain: they threaten every independent country, they are levelled at every free constitution. Where is the right of interference to stop, if these armed despots, these self-constituted judges, are at liberty to invade independent States, enjoying a form of government different from their own, on pretence of the principle on which it is founded being not such as they approve, or which they deem dangerous to the frame of society established among themselves.<sup>2</sup>

§ 23. *A public war* is one carried on under the direction, or at least with the sanction, of the supreme authority of the State. 'If it is declared in form,' says Wheaton, 'or is duly commenced, it entitles both the belligerent parties to all the

<sup>1</sup> These remarks apply, not without justice, to the war of Russia against Turkey, 1877.

<sup>2</sup> Vide *ante*, chapter iv. ; Phillimore, *On Int. Law*, vol. i. §§ 389, 390; Alison, *Hist. of Europe*, second series, ch. xii. §§ 32-40; Hansard, *Parl. Debates*, vol. viii. pp. 46, 64, 242, 890; Brougham, *The Works of*, vol. ix. p. 279; De Cussy, *Précis Historique*, ch. iv.

rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties, is equally permitted to the other.<sup>1</sup>

§ 24. A *private war* is one carried on by individuals, or united bodies of individuals, without the authority or sanction of the State of which they are subjects. Such contests may take place between individuals of the same State, or of different States. The first are not the objects of international law, but of the local laws and jurisdiction of the particular State. The second may or may not belong to international jurisprudence, according to the circumstances of each particular case. As has already been said, every State is, in general, responsible for the acts of its subjects while within its control and jurisdiction; so, also, is it bound to protect its subjects in all their just rights, and to procure indemnity for any wrongs that may be inflicted on them. But the acts of private individuals, whether citizens or foreigners, are, as a general rule, to be judged of and punished by the tribunals, and according to the laws, of the place where they are committed. Grotius has devoted considerable space to prove that some kinds of private war are not repugnant to the law of nature, and therefore may be lawfully waged. But his reasoning is not applicable to the present system of international jurisprudence.<sup>2</sup>

§ 25. A contest by force between different members of the same society or State has sometimes been called a *mixed war*. Grotius regards such a war as *public* on the side of the established authorities, and *private* on the part of those who resist such authorities. Such a contest on the part of individuals against the established government may be a mere insurrection or rebellion, and the acts of such *individual* insurgents, or rebels, in resisting or opposing the authority of the government, may, as already stated, be punished according to the municipal law which they have violated; but where the con-

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 6.

<sup>2</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. iii. § 1; Bello, *Derecho Internacional*, pt. ii. cap. i. § 1; De Felice, *Droit de la Nature*, etc., tome ii. lec. xxii.; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. iii.



test assumes the character of a *public war*, as defined and recognised by the law of nations, it is the general usage for other States to concede to both parties the rights of war, so far as regards the law of blockades, of contraband, etc. It must be remembered, however, that every insurrection or rebellion is by no means a public war, and a State which recognises it as such, does so under the responsibilities which are imposed by the laws of international comity. It should, also, be remarked that, in such cases, belligerent rights may be superadded to those of sovereignty, that is, the contending parties may exercise belligerent rights with regard to each other and to neutral powers, while, at the same time, the established government of the State may exercise its right of sovereignty in punishing, by its municipal laws, individuals of the insurgent or revolting party, as rebels and traitors.<sup>1</sup>

§ 26. Hostile collisions of States have sometimes been divided into *perfect* and *imperfect* wars. A *perfect* war is where the whole State is placed in the legal attitude of a belligerent toward another State, so that every member of the one nation is authorised to commit hostilities against every member of the other, in every place, and under every circumstance, permitted by the general laws of war, and subject only to the limitations and exceptions prescribed by such laws. An *imperfect* war is limited as to places, persons, and things. Such was the character of the hostilities authorised by the United States against France in 1798.<sup>2</sup>

§ 27. Grotius divides public wars into *solemn wars* and *wars non-solemn*. The former include all those which are waged under the authority of the State, and are duly commenced or declared in form. Both the authority and the formality are requisite to constitute a solemn war. 'But a public war, less solemn,' says Grotius, 'may be without those formalities (of a solemn war), and be made against private men, and have for its authority any magistrate. And, indeed, if we consider the thing without respect to the civil law, every magistrate seems to have the power of making war, as in the defence of the people entrusted to him, so, also, to exercise

<sup>1</sup> Grotius, *suprà*; Vattel, *Droit des Gens*, liv. ii. ch. iv. § 56; Rose v. Himeley, 4 Cranch R., 272.

<sup>2</sup> Polson, *Law of Nations*, sec. 6; Miller v. Ship 'Resolution,' 2 Dall. R., 21; Bas v. Tingy, 4 Dall. R., 37.

that jurisdiction, if violence be offered. But, since by war the whole city or State is endangered, therefore it is provided, by the laws of almost all nations, that war be not made but by the authority of him who has the sovereign power in the State. There is such a law in Plato's last book, *de Legibus*. And by the Roman laws he was reckoned guilty of high treason, who, without commission from the prince, presumed to make war, muster soldiers, or raise an army. And the *Cornelian law*, enacted by L. Cornelius Sylla, says: 'Without commission from the people.' In the code of Justinian there is a constitution extant, made by Valentinian and Valens, thus: 'Let no man dare to raise an army without our knowledge and advice.' To this we may refer that of St. Austin, 'natural order, accommodated to the peace of mankind, requires this, that the authority and counsel of raising war should be in the power of princes. . . But if the danger be so pressing, that time will not allow to consult the supreme magistrate, here necessity grants an exception. L. Pinarius, governor of Enna, a Sicilian garrison, presuming on this right, upon certain information that the townsmen designed to revolt to the Carthaginians, preserved the place by putting them to death. Franciscus de Victoria has pretended to transfer the right of making war to the citizens even beyond such a necessity, to revenge those injuries which the king neglects to adjust, but his opinion is justly rejected by others.'<sup>1</sup>

§ 28. The question has sometimes arisen how far the hostile act of a subordinate officer, as, for instance, the governor of a province, is to be regarded as the act of his sovereign or State; and how far the officer is to be held individually responsible.<sup>2</sup> The most approved and reasonable

<sup>1</sup> Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. iii. ; Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. iii. § 4.

In England it is high treason to commence warfare without authority from the King (Coke, 3 *Inst.*), unless the necessity be so immediate and extraordinary as to leave no time to obtain the royal sanction.

By the ancient law of England, war was termed *solemn* when the courts of justice were closed, and the civil magistrates were unable to do their duty. And the question was, if necessary, to be tried and determined by the judges, and not by a jury.

<sup>2</sup> In 1868, Mr. Eyre, ex-governor of Jamaica, came before the Court of Queen's Bench upon a prosecution for acts of alleged abuse and oppression, under colour of his office, as governor of the island. He was prosecuted under the 42 Geo. III., c. 85, which enacted that if any governor



doctrine is, that if the act is ratified by his government, or rather, is not disclaimed, the government is responsible; otherwise, it becomes an individual act, and the guilty party should be surrendered up for punishment. Burlamaqui says: 'A mere presumption of the will of the sovereign would not be sufficient to excuse a governor, or any other officer, who should undertake a war, *except in the case of necessity*, without either a general or a particular order.' . . . 'Whatever part the sovereign would have thought proper to act, if he had been consulted, and whatever success the war undertaken without his order may have had, it is left to the sovereign whether he will *ratify* or *condemn* the act of the minister. If he *ratifies* it, this approbation renders the war solemn, by reflecting back, as it were, an authority upon it, so that it obliges the whole commonwealth. But if the sovereign condemn the act of the governor, the hostilities committed by him ought to pass for a sort of robbery, the fault of which by no means affects the State, provided the governor is delivered up and punished according to the laws of the country, and proper satisfaction be made for the damage sustained.'<sup>1</sup>

of a colony, or any military officer holding any station in a colony, should be guilty of any crime or offence in the exercise or execution of his office, or under colour of it, he should be liable to be tried at Westminster. There was no doubt, that what he had done, was done as governor of Jamaica, and that if anything was an offence, it was done under colour of his office. Lord (then Mr. Justice) Blackburn charged the grand jury that 'the legal duty, and therefore the legal responsibility, of persons in such a position, varies very much according to their powers and functions . . . but the principle is the same; the officer is bound to exercise the powers which the law gives him in the manner which under the circumstances would be right, and if he fails in something he ought to do, or which the circumstances render it his duty to do, and he neglects his duty to such an extent as to amount to criminal negligence, then he will be criminally responsible.' Thirty years before, the Mayor of Bristol had been prosecuted for not having taken proper steps to put down the riots in that city, which had continued for three days, and a great part of Bristol was burnt down. Mr. Eyre's was the converse of that case; he was charged with having exceeded his duty. Under the Colonial Act, Mr. Eyre had power, in case of apprehended danger, to proclaim martial law in the sense of suspending the common law, and enabling matters to be tried by summary procedure 'such as in armies in time of war.' And he did so. 'Looking at the insurrection,' continued Lord Blackburn, 'the massacre and the efforts of the insurgent negroes to rouse the country for the purpose of insurrection, I have no hesitation in saying that not only was there no culpability in declaring martial law, but that probably the governor would have been punishable if he had not declared it.' The grand jury returned no bill.—See *Ann. Reg.* cx., 206; *R. v. Pinney*, 3 *B. and A.*, 958; *Keeley v. Carson*, 4 *Moore P. C. R.*, 85.

<sup>1</sup> Burlamaqui, *supra*; the *People v. McCloud*, 25 *Wend. R.*, 552.

§ 29. Vattel divides all hostile collisions between nations into 'two sorts of wars, *lawful* and *unlawful*.' Unlawful wars are those undertaken 'without apparent cause,' and for 'havoc and pillage,' and all which do not come under this head are classed as lawful wars. Unlawful wars are such as were waged by the 'Grandes compagnies,' which had assembled in France during the wars with the English; armies of banditti which ranged about Europe purely for spoil and plunder. Such were the cruises of the *filibusters*, without commission, and in time of peace; and such, in general, are the depredations of pirates. 'To the same class belong almost all the expeditions of the African corsairs, though authorised by a sovereign, they being founded on no apparent just cause, and whose only motive is the avidity of captures. I say these two sorts of war, *lawful* and *unlawful*, are to be carefully distinguished, their effects, and the rights arising from them, being very different.'<sup>1</sup>

§ 30. Writers on international jurisprudence very properly distinguish between *unlawful* and *unjust* wars. Where the war is duly declared or begun, and carried on by the proper authority of the State, it is a lawful war, and, by the voluntary law of nations, is regarded as a just war so far as the belligerent rights of the parties are concerned. Vattel compares the State that carries on an unjust war to the individual who refuses to pay his honest debts, on the ground of prescription. This rule of civil law is made for the general benefit of the community, although it may at times enable the individual to offend against his duty. So of the law of nations. In order to avoid, as far as possible, the evils of human society, it is agreed to regard every lawfully declared war as just on both sides. But, says Vattel, 'we are never to forget that this voluntary law of nations, which is admitted from necessity, and to avoid greater evils, *does not give to him whose arms are unjust a genuine right, capable of justifying his conduct, and acquitting his conscience, but only the external effect of the law and impunity among men.*'<sup>2</sup>

<sup>1</sup> Vattel, *Droit des Gens*, lib. iii. ch. iv. § 67.

<sup>2</sup> Vattel, *Droit des Gens*, liv. iii. ch. xii. §§ 188-192.

On August 9, 1864, Prince Bismarck addressed a note to the Prussian Minister in London, in which, alluding to the preliminaries of peace which had been signed at Vienna, he said he hoped the British Government would recognise the moderation and placability displayed by Prussia and Austria towards Denmark. To this Earl Russell replied



§ 31. It has already been shown, in speaking of seizures and reprisals, that the hostile acts of individuals, when ratified and assumed by their government, are to be regarded as the hostile acts of the State. These acts may be of the character of reprisals, or of mixed or imperfect war, or of a virtual declaration and commencement of solemn war. Such acts, however, must not exceed what the laws of war have established as belligerent rights of the subjects of hostile States. For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war, not authorised or assumed by his government, as the act of the State. The distinction between the two cases is manifest, and should never be lost sight of: the latter is punishable by the rules of civil law, while the former is an offence against the law of nations, punishable only by the laws and usages of war. The taking of property, and of human life, in the one case, would be robbery and murder, punishable under the local laws; while in the other case the same acts might be fully justifiable as the lawful exercise of belligerent rights under the law of nations.<sup>1</sup>

that, 'challenged by M. de Bismarck's invitation to admit the moderation and forbearance of the great German Government, Her Majesty's Government feel bound not to disguise their own sentiments upon these matters. Her Majesty's Government have indeed from time to time, as events took place, repeatedly declared their opinion that the aggression of Austria and Prussia upon Denmark was unjust, and that the war as waged by Germany against Denmark had not for its groundwork either that justice or that necessity which are the only bases on which war ought to be undertaken. Considering the war, therefore, to have been wholly unnecessary on the part of Germany, they deeply lament that the advantages acquired by successful hostilities should have been used by Austria, and Prussia, to dismember the Danish Monarchy, which it was the object of the Treaty of 1852 to preserve entire. Her Majesty's Government are also bound to remark, when the satisfaction of national feelings is referred to, that it appears certain that a considerable number—perhaps two or three hundred thousand—of the Danish population are transferred to a German State, and it is to be feared that the complaints hitherto made respecting the attempts to force the language of Denmark upon the German subjects of a Danish sovereign, will be succeeded by complaints of the attempts to force the language of Germany upon the Danish subjects of a German sovereign. . . . If it is said that force has decided the question, and that the superiority of the arms of Austria and Prussia over those of Denmark was incontestable, the assertion must be admitted. But in that case it is out of place to claim credit for equity and moderation.'—See *Ann. Reg.*, cvi. 231.

<sup>1</sup> *Vide ante*, ch. xiv.; *Opinions U. S. Attys Genl.*, vol. i. p. 81; *Carrrington et al. v. C. Ins. Co.*, 8 *Peters R.*, 522; *Tallmadge Review*, etc., 26 *Wend. R.*, app., 674; *Thorshaven and its Depend.*, 1 *Edw. R.*, 102; *Brown v. The United States*, 8 *Cranch. R.*, 132; *Heffter, Droit International*, § 119.

## CHAPTER XVII.

## DECLARATION OF WAR AND ITS EFFECTS.

1. By whom war is to be declared—2. Ancient modes of declaring it—3. Modern practice of unilateral declaration—4. When this may be dispensed with—5. Conditional declaration—6. Offers after declaration—7. Object of declaration in defensive war—8. Effect upon individuals—9. On commerce, contracts, etc.—10. Carrying supplies and withdrawing goods—11. Single exception to rule of non-intercourse—12. Effect upon subjects of an ally—13. Subjects of enemy in territory of belligerents—14. Laws of particular States—15. Enemy's property in territory of belligerents—16. Conduct of belligerents in war of 1853-4—17. Debts due to subjects of an enemy—18. Opinions of Kent and Wheaton—19. Distinction made by England between debts and other property—20. Her conduct towards Denmark in 1807—21. Commencement of war, how determined—22. How notified to neutrals—23. Effects of declaration of war on treaties—24. On local civil laws—25. Martial and military law—26. Martial law in European countries—27. U. S. Constitution on suspension of writ of *habeas corpus*—28. Examples of its suspension—29. Powers and duties of the President—30. Exercise of power to declare martial law.

§ 1. THE right of making war, as well as the right of authorising retaliations, reprisals, and other forcible means of settling international disputes, belongs, in every civilised nation, to *the supreme power of the State*, whatever that supreme power may be, or however it may be constituted. As States are known to each other only through their constituted authorities, so all other relations, whether peaceful or hostile, must be settled by their recognised governments. They cannot be legally changed or interfered with by individuals. But this supreme power, originally resident in the body of the nation, may be made up of different elements, which are divided and limited according to the will of the nation, and it is only from the particular institution, or fundamental laws of each State, that we are to learn where the power resides which is authorised to make war in the name of the society at large. In the ancient republics of Greece



and Italy, and among the ancient Germans, it resided with the people in their collective capacity. In England and other monarchical governments of Europe, it is vested in the crown. In the United States it is confided to the federal legislature. Where it resides with the people and is retained by them as a portion of sovereign power, it must be exercised by them in their collective capacity as provided by constitutional law, and neither individuals, nor bodies of individuals, less than the sovereign authority of the entire State, can authorise the making of a public war. Nevertheless a subordinate or local officer, as will hereafter be shown, may commence hostilities in certain cases, his acts being subsequently ratified by the proper authority, as was the case with General Taylor on the Rio Grande, in the war of 1846 between the United States and Mexico.<sup>1</sup>

§ 2. It was customary, in former times, to precede hostilities by a public declaration, communicated to the enemy. This was always done by the ancient Greeks and Romans.

<sup>1</sup> The king has the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power; and this right is given up, not only by individuals, but even by the entire body of people that are under the dominion of a sovereign. It would, indeed, be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war. Whatever hostilities, therefore, may be committed by private citizens, the State ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorised volunteers in violence, are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law.—*Hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: ceteri latrones aut prædones sunt.* And the reason which is given by Grotius, why, according to the law of nations, a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put on his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community, whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that in order to make a war completely effectual, it is necessary in England that it be publicly declared and duly proclaimed by the king's authority, and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of Parliamentary impeachment, for improper or inglorious conduct, in beginning, or conducting, or concluding a national war, is in general sufficient to restrain the ministers of the Crown from a wanton or injurious exertion of this great prerogative.—Blackst. *Comm.*, vol. i. ch. 7.

The latter first sent the chief of the *feciales*, called the *pater-patratus*, to demand satisfaction of the offending nation; and if, within the space of thirty-three days, no satisfactory answer was returned, the herald called the gods to witness the injustice, and came away, saying that the Romans would consider upon the measures to be adopted. The matter was then referred to the senate, and, when the war was resolved on, the herald was sent back to the frontier to make declaration in due form. Invasions, without such public notice, were looked upon as unlawful, and no nation was regarded as an enemy of the Roman people until war was thus publicly declared against it. By such scrupulous delicacy, says Vattel, in the conduct of her wars, Rome laid a most solid foundation for her subsequent greatness. During the middle ages, and even as late as 1635, a declaration of war to the enemy, previous to beginning hostilities, was generally made, and indeed was required by the laws of honour and chivalry.<sup>1</sup>

§ 3. But in modern times the practice of a formal declaration to the enemy has fallen into entire disuse, the belligerents limiting themselves to a public declaration within their own territories and to their own people. The latest example of a public declaration to the enemy was that of France against Spain, at Brussels, in 1735, by heralds at arms, according to the forms observed during the middle ages. For a long time, however, writers on public law were divided in opinion with respect to the propriety of the modern practice of commencing war without any formal declaration to the enemy. Grotius, Puffendorf, Valin, Emerigon and Vattel think that such declaration should be made, while Bynkershoek, Heineccius and more recent writers maintain that, although such declaration may very properly be made, yet it cannot be required as a matter of right. There is nothing in international jurisprudence, as now practised, to render such declaration obligatory, and the present usage entirely dispenses with it. All, however, agree that there should be some manifesto, declaration, or publication made within the territory of the State which declares the war, announcing the existence of hostilities; and such manifesto, or publication, usually sets forth the motives for commencing the war. Some such formal act,

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 53; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 51.



proceeding from the competent authority, seems necessary in order to announce to the people at home, and to apprise neutral nations of, the war, for their instruction and direction in respect to their intercourse with the enemy. 'Without such a declaration,' says Wheaton, 'it might be difficult to distinguish, in a treaty of peace, those acts which are to be accounted lawful effects of war, for those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.' Moreover neutral States have a right to know, by some formal and authoritative act, that hostilities exist in form as well as in fact, on account of the interests of their own subjects, whose duties and relations to the belligerents are essentially changed by the new condition of things. It is not material under what form such notice is given, whether by proclamation, or by a mere act of the legislative branch of the government. Thus, in the war of 1812, between the United States and Great Britain, hostilities immediately commenced as soon as Congress had passed the act, without waiting to communicate the fact either to England or to neutral States.<sup>1</sup>

<sup>1</sup> Grotius, *De Jur. Bel. ac Pac.*, lib. iii. cap. iii. § 5; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 8; Bynkershoek, *Quæst. Jur. Pub.*, lib. iii. cap. ii.; Vattel, *Droit des Gens*, liv. iii. ch. iv. §§ 51-56; Emerigon, *Traité des Assurances*, ch. xii. § 35; Heineccius, *Elementa Juris Nat. et Gent.*, lib. ii. § 198; the 'Nayade,' 4 *Rob.*, 253; the 'Eliza Ann,' 1 *Dod. R.*, 247.

A formal declaration of war cannot be said to be strictly necessary. Nevertheless, civilisation would seem to demand it. It was duly made by England to Russia before the commencement of the Crimean War, 1854. It was, also, made by France to Prussia, before the commencement of the Franco-Prussian War, 1870. Calvo (*Droit Int.*, ii. p. 33) is even of opinion that the Declaration of Paris, 1856, has rendered it obligatory on the subscribing powers.

A state of actual war may exist without any formal declaration of it by either party, and this is true of both a civil and a foreign war.—*Prize Cases*, 2 *Black.* 635; the 'Brillante' v. United States, 11 *Am. Law Rep.*, N.S., 334.

Declaration of war preceded the war of 1866 between Austria and Italy, and that of 1876 by Serbia against Turkey.

It is interesting to record the commencement of the hostilities in the last Franco-Prussian War. On July 19, 1870, at three o'clock in the morning, a patrol of French cavalry galloped up to the Custom-house of Forsterhohe, on the Saarbruck frontier, and carried off the frontier guard Ehme, performing his duties as a collector of customs, and the guard Roscheds, also stationed at that Custom-house. After having seized the arms of these Custom-house officers, and the money chest, containing, however, only a few crowns, the French patrol retired precipitately, pursued by a picket of German Lancers, who had come in haste to the spot. Some shots exchanged in this meeting were without effect.

§ 4. Notwithstanding a very general accordance, in modern wars, with the doctrine of unilateral declaration, there are quite a number of instances where wars between the most civilised nations have been commenced and carried on without a formal declaration of any kind. But these instances have generally resulted from peculiar circumstances, which rendered, or seemed to render, a public declaration unnecessary or inconvenient; they are, therefore, exceptions to the general rule established by modern usage. Thus, the war of 1846, between the United States and Mexico, was commenced by a conflict of armed forces on the disputed territory, and without any declaration on either side. The congress of the United States immediately passed an act recognising the existence of the war. The war of 1792, between France and Great Britain, was preceded by no formal declaration; the British ambassador was withdrawn, and the French ambassador dismissed, whereupon the National Assembly of France passed a vote of war and the seizure of British property. Phillimore deems this proceeding to have been 'perfectly justifiable *in point of form*.' So, also, the war of 1778 between the same powers, was commenced without any formal declaration on either side, the treaty of alliance between France and the revolted English colonies of North America being deemed, in itself, sufficient to justify hostilities on the part of Great Britain. History affords other examples of the same kind. Even admitting the views of Hautefeuille, that such wars are violations of the law of nations, so far as concerns the failure to make a formal declaration, it will hardly be contended that all the belligerent acts of the parties, during the continuance of the war, are, of consequence, illegal, and violations of international jurisprudence. It is, therefore, necessary to fix a time when the war is to be regarded as regular or formal. This is no easy matter: different solutions of the question have been proposed, the most sensible of which is the rule that, in such cases, the legitimate consequences of war flow directly from the state of public hostilities, and that the effects which the voluntary law of nations attributes to solemn war date, with respect to belligerent rights, from the commencement of such hostilities, and, with respect to neutral duties, from an official announcement, or a positive knowledge, of the existence of the war.<sup>1</sup>

<sup>1</sup> Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. ix.; Hautefeuille,



§ 5. Declarations of war may be either *absolute* or *conditional*. Hostilities result at once from the former, and the two nations are regarded as belligerents from the date of the declaration. But the demand of the one power upon the other may be accompanied by a notification that hostilities will be commenced unless satisfaction upon some matter specified be obtained immediately, or within a certain limited time. In this case the war dates from the commencement of hostilities. Sometimes, however, it is very difficult, in such cases, to fix the exact point where belligerent rights begin, and when the duties of neutrals, and the obligations of subjects, incident to the new relations of the two States, have commenced. The rule given in the preceding paragraph applies also to cases of conditional declaration.

§ 6. If the enemy, says Vattel, on either declaration offers equitable conditions of peace, the war is to be suspended, for whenever justice is done all right of employing force is superseded. To these offers, however, are to be added good and sufficient securities, for we are under no obligations to suffer ourselves to be amused by empty proposals. Moreover, we have a right to demand security, not only for the principal objects for which hostilities were declared, but also for the expenses incurred in making preparations for the war. The nature of this security will depend upon the peculiar circumstances of the case, or the confidence we are willing to repose in the word of the enemy. If the war was declared for the recovery of territory unjustly withheld from us, its immediate surrender would satisfy the main object of the declaration.<sup>1</sup>

§ 7. Although Vattel strenuously insists upon the ancient rule, that the declaration of war must, in general, be communicated to the State against which it is made, he makes the case of a war strictly defensive an exception. He who is attacked, he says, and wages only a defensive war, need not make a formal declaration, as the state of war is sufficiently determined by the declaration or conduct of the enemy. Nevertheless, the nation which is attacked seldom omits to make such declaration, either from a sense of its own dignity, or for the information of its own subjects and of neu-

*Des Nations Neutres*, tit. iii. ch. i.; Phillimore, *On Int. Law*, vol. iii. §§ 51 et seq.; Moser, *Versuch, etc.*, b. xviii. cap. ii. § 4; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 4; the 'Eliza Ann,' 1 *Dod. R.*, 247.

<sup>1</sup> Vattel, *Droit des Gens*, liv. iii. ch. iv. § 54.

tral States. It has already been shown that modern usage does not absolutely require a formal declaration in any case, *ex debito justitiæ inter gentes*, although some public act, recognising the existence of the war, may be required by public or municipal law, in order to determine the duties and relations of the subjects of the belligerents. Such recognition seems as necessary in a defensive as in an offensive war. Thus, when Sweden, in 1812, had declared war against Great Britain, and the British government had neither issued a counter-declaration nor caused any official declaration to be made to its own subjects, Sir William Scott said it might be a question of nicety to determine how far the Swedish proclamation 'would affect the rights of British subjects to carry on their accustomed intercourse with the ports of Sweden.'<sup>1</sup>

§ 8. A war duly declared, or officially recognised, is not merely a contest between the governments of the hostile States in their political character or capacity; on the contrary, its first effect is to place every individual of the one State in legal hostility to every individual of which the other is composed, and these individuals retain the legal character of enemies, in whatever country they may be found. In the next place, all the property of the one State, and of each of its citizens, is deemed hostile with respect to the opposing belligerent. Very important consequences, as to the rights of persons and property, are deducible from these principles. We here allude only to the general doctrine of the effects of a declaration of war; the limitations and modifications of this doctrine, by usage and constitutional law, will be discussed in another place.<sup>2</sup>

§ 9. One of the immediate and important consequences of this principle, which has been fully confirmed by the usages of modern warfare, and by the decisions of the judicial tribunals of Europe and the United States, is, that a declaration, or recognition, of war, effects an absolute interruption and

<sup>1</sup> Vattel, *suprà*; the 'Success,' 1 *Dod. R.*, 133.

<sup>2</sup> When one nation is at war with another nation, all the subjects or citizens of the one, are deemed to be in enmity to the subjects or citizens of the other; they are personally at war with each other, and have no capacity to contract.—(Supreme Ct.), *White v. Burnley*, 20 *How*, 235.

It was held, by the British Court of Admiralty, that the British Order in Council, of April 15, 1854, did not permit an enemy, during the Crimean war, to sell his ships in the ports of Great Britain.—The 'Odessa,' *Spink's P. R.*, 208.



interdiction of all commercial intercourse and dealings between the subjects of the two countries. The idea, says Kent, that any commercial intercourse, or pacific dealing, can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the duties growing out of a state of war. It is a well-settled doctrine, in the English courts, and with the English jurists, that there cannot exist, at the same time, a war of arms and a peace of commerce. The war puts an end at once to all dealings and all communications with each other. This is equally the doctrine of all the authoritative writers on the law of nations, and of the maritime ordinances of all the great powers of Europe. It was frequently so decided by the congress of the United States, during the revolutionary war, and, again, by the supreme court of the United States during the war of 1812. This doctrine renders null and void all contracts with the enemy during the war; it makes illegal the insurance of enemy's property, prohibits the drawing of bills of exchange, by an alien enemy on a subject of the adverse government, the purchase of bills on the enemy's country, or the remission and deposit of funds there, and the remission of money or bills to subjects of the enemy. All endeavours to trade with the enemy, by the intervention of third persons, or by partnerships, are equally forbidden, and no artifice can legalise any trade, communication, or contract of whatsoever character, without the express permission of the government. The subjects of the belligerent States cannot commence or carry on any correspondence or business together, and all commercial partnerships, existing between the subjects of the two parties prior to the war, are dissolved by the mere force and act of the war itself: though other contracts, existing prior to the war, are not extinguished, but the remedy is only suspended, and this from the inability of an alien enemy to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*.<sup>1</sup>

§ 10. 'This strict rule,' says Kent, 'has been carried so far in the British admiralty, as to prohibit a remittance of

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. pp. 66, 68; the 'Indian Chief,' 3 Rob., 22; the 'Pieter,' 4 Rob., 49; the 'Franklin,' 6 Rob., 127; the 'Joseph,' 8 Granch. R., 451; the 'Hoop,' 1 Rob., 196.

his own subsistence. In the case of a bill of exchange drawn upon England, by a British prisoner in France, for his own subsistence, and endorsed to an alien enemy, the latter was allowed to enforce it on the return of peace.<sup>1</sup>

§ 12. 'It is equally illegal,' says Kent, 'for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests, and object, and action, creates a mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally engaged in a trade with a common enemy, and thereby affording him aid and comfort, whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such warlike confederacy, that neither of the belligerents, without the other's consent, shall do anything to defeat the common object.' Wheaton says that no subject of an ally can trade with the common enemy in a conjoint war, without being liable to the forfeiture, in the prize courts of an ally, of his property engaged in such trade. And that, as the rule with respect to the subjects of the belligerent State can be relaxed only by the permission of the sovereign power of the State, so the rule, with respect to the subjects of allies, can be relaxed only by the permission of the allied nations, according to their mutual agreement.<sup>2</sup>

§ 13. One of the immediate consequences of the position in which the citizens and subjects of belligerent States are placed, by the declaration of war, is, that all the subjects of one of the hostile powers, within the territory of the other, are liable to be seized and retained as prisoners of war.<sup>3</sup> But this extreme right, founded on the positive law of nations, has been stripped of much of its rigour in modern warfare, by

<sup>1</sup> Antoine *v.* Morehead, 6 *Taunton Rep.*, p. 237, and see *post*, vol. ii. p. 154.

<sup>2</sup> Kent, *Com. on Am. Law*, vol. i. p. 69; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 14.

<sup>3</sup> See *post*, vol. ii. pp. 95-98. But previously to the siege of Paris, during the war of 1870, all Germans living in that city were compelled to leave it.



the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws and ordinances of particular States. These affect, more or less, the exercise of this extreme right of war; but the *right* itself still remains, and may, under certain circumstances, be enforced, at the discretion of the belligerent. Bynkershoek mentions several instances arising in the seventeenth, and one as early as the fifteenth, century, of stipulations in treaties allowing foreign subjects a reasonable time to withdraw with their effects. Such stipulations, says Kent, have now become an established formula in commercial treaties. Emerigon considers such treaties as an affirmative of common right, or the public law of Europe. Vattel also says that the sovereign who declares war cannot detain those subjects of the enemy who are within his dominions, at the time of such declaration, and that they are to be allowed a reasonable time to withdraw, because, by permitting them to enter his territories, he tacitly promised them protection, and security for their return. The current of opinion, however, is in favour of the doctrine that the general *right* still exists as a rule of law, though its *exercise* has been limited and modified by usage and conventional law, and by municipal ordinances and regulations.<sup>1</sup>

§ 14. In England it was provided by *Magna Charta*, that upon the breaking out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached, 'without harm to body or goods,' until it be known how English merchants were treated by the enemy.<sup>2</sup>

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 56; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 63; Emerigon, *Traité des Assurances*, ch. xii. sec. 35; Bynkershoek, *Quæst. Jur. Pub.*, cap. ii. § 7.

Letters of advice, correspondence, and intelligence, from an English subject in England, to the enemy to enable the latter to cause annoyance or to defend themselves, written and sent in, in order to be delivered to them, are, though intercepted, overt acts of treason.—*R. v. Hensey*, 1 Burr. R., 650; *R. v. Stone*, 6 D. and E., 527.

For cases concerning the unlawfulness of various dealings with residents of the insurgent States, during the American Civil War of 1861-65, see the 'Reform,' 3 Wall., 617; *United States v. Weed*, 5 ib., 62; the 'Gray Jacket,' ib., 342; the 'Hampton,' ib., 372; the 'Sea Lion,' ib., 630; the Cotton Cases, 2 Ct. of C. C. R. (*Nott and H.*), 529; S. C., 6 Int. Rev. Rec., 21; *Blakeley v. United States*, 2 Ct. of C. C. R. (*Nott and H.*), 323; the 'David E. Wolf,' 1 Int. Rev. Rec., 194.

<sup>2</sup> This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook, that it was a maxim among the Goths and Swedes, *Quam legem exteri nobis posuere, eandem illis ponemus*.—See Black. Comm., ch. vii.

By the statute of 27 Edward III., c. 17, foreigners were to have convenient warning of forty days, by proclamation, to depart the realm with their goods. The act of congress of July 6, 1798, authorised the President, in case of war, to direct the conduct to be observed towards subjects of the hostile nation, being aliens and within the United States, and in what case, and upon what security their residence should be permitted; and it declared, in reference to those who were to depart, that they should be allowed such reasonable time as might be consistent with the public safety, and according to the dictates of humanity and national hospitality, 'for the recovery, disposal, and removal of their goods and effects, and for their departure.' By the Spanish decree of February, 1829, making Cadiz a free port, it was declared that, in the event of war, foreigners who had established themselves there for the purpose of commerce, and becoming alien enemies by means of the war, were to be allowed a proper time to withdraw, and their property was not to be subject to sequestration. Other nations have made similar decrees and ordinances, substituting a milder rule than the ancient and sterner doctrine of international law; but, however strong the current of modern authority in favour of the milder principle, nevertheless, the ancient and stricter rule must still be regarded as the law of nations; and such has been the decision of the supreme court of the United States. There, however, should be a very strong case in order to justify the exercise of this extreme right, as the spirit of the age is decidedly against it. At the opening of the war of 1803, between France and Great Britain, Napoleon made prisoners of all English subjects travelling in France. The pretext for this exercise of the extreme right of war was the capture of French vessels in the bay of Audière by the English, prior to the declaration of war, and other violations of maritime law. The law of retaliation would hardly seem to require, or even to justify, a resort to means so unusual and odious, although within the extreme limits fixed by the ancient and severer rules of war.<sup>1</sup>

§ 15. What we have said of the detention of the enemy's person, also holds good with respect to the right to seize and

<sup>1</sup> Massé, *Droit Comm.*, liv. ii. tit. i. ch. ii. §§ 1, 2; Thiers, *Hist. du Cons. et de l'Empire*, liv. xvii.; Las Cases, *Mémoires de Napoléon*, vol. vii. pp. 32, 33; *U. S. Statutes at Large*, vol. i. p. 577; Bello, *Derecho Internacional*, pt. ii. cap. ii. § 2; Heffter, *Droit International*, § 126.



confiscate all enemy's property, found within the territory of the other belligerent at the commencement of hostilities.<sup>1</sup> In former times, this right was exercised with great rigour, but it has now become an established, though not inflexible, rule of international law, that such property is not liable to confiscation as a prize of war. This rule, says Chief Justice Marshall, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign—it is a guide which he follows or abandons at his will; and, although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.' The supreme court of the United States has decided that that Government has a right to seize and confiscate all goods of the enemy found in the country, and all vessels and cargoes found afloat in its ports, at the commencement of hostilities; but that this right was vested in congress, and, until some statute, directly applying to the subject, be passed, the courts could not condemn such property; that it would continue under the protection of the law, and might be claimed by the owner on the restoration of peace. We have already stated the ancient law of England, which prescribes that, at the commencement of a war, the enemy's merchants, with their goods, were to be treated precisely as the English merchants, with their goods, were treated in the enemy's country. But the modern practice of Great Britain has been far less liberal. 'In the recent maritime wars commenced in that country,' says Wheaton, 'it has been the constant usage to seize and condemn, as droits of admiralty, the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect.' The English text-writers, down to the beginning of the war of 1854 with Russia, continued to maintain the existence of the right to seize and condemn, not only as a general right of war, but as one which could be exercised by the crown, without any express act of parliament to sanction it.<sup>2</sup>

<sup>1</sup> In a civil war, captures of the property of those in rebellion against the established Government, whether made on land or sea, are not prize of war; such can only be condemned by virtue of municipal law—United States *v.* 269½ bales of Cotton, *Rev. Cas.*, 2; the 'Mary McRae,' *Blatchf. Pr. Cas.* 91.

<sup>2</sup> Wheaton, *Elem. Int. Law*, p. iv. ch. i. § 11; *Brown v. The United*

§ 16. On the declaration of a war between the Ottoman Porte and Russia, in October, 1853, a notice was issued by the latter government to the effect that, as the Porte had not imposed an embargo on Russian vessels in its ports, &c., the Russian government, on its part, grants liberty to Turkish vessels in its ports to return to their destination, till the 10th (22nd) of November. After the declaration of hostilities by France and England against Russia, similar declarations were made by these powers. That of France, dated March 27, 1854, declares: 'Article one. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports, and remain there for the completion of their cargoes, until the 9th of May, inclusive.' The declaration of England, to the same effect, was dated March 29, 1854. Still further indulgences were afterward declared to Russian vessels, which had sailed prior to May 15, 1854, for English and French ports. Russia allowed English and French vessels six weeks from April 25, 1854, to take on board their cargoes and sail from Russian ports in the Black Sea, the Sea of Azoff, and the Baltic, and six weeks from the opening of navigation, to leave the ports of the White Sea.<sup>1</sup>

§ 17. Debts contracted before the declaration of war, and owing by one belligerent, or its allies, to the enemy, are necessarily merged in the war, and must abide the issue of the contest, or rather the stipulations of the treaty of peace by which it is terminated. Formerly debts contracted in time of peace, and owing by the belligerent State, or its subjects, to the subjects of the enemy, were also regarded as annulled or confiscated by the declaration of war. This doctrine is fully recognised in the writings of Cicero, Grotius, Puffendorf, Bynkershoek, and others. But, according to Vattel, the rigour of this rule was afterwards relaxed, and the oppo-

States, 8 *Cranch. R.*, 123; Klüber, *Droit des Gens*, §§ 250-252; Moser, *Versuch, etc.*, b. ix. §§ 49-60; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 63; ch. v. §§ 76, 77; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 6. See also, vol. ii. p. 126.

<sup>1</sup> *Paris Moniteur*, March 28, 1854; *London Gazette*, April 18 1854; *Cong. Doc.*, 33 *Cong.*, H. R. No. 103, p. 5; *Circulaire du Ministre de la Marine, Annuaire, etc.*, 1853-4, app. v. pp. 913, 926, 928.



site custom grew up in its place, which has now become so general throughout Europe, that the sovereign who should enforce the former rule, would be regarded as violating good faith; for strangers trusted his government or subjects only from the firm persuasion that the modern custom would be observed. Emerigon and Martens advocate the same doctrine. The question is also most ably discussed by Hamilton in the numbers of *Camillus*, published in 1795.

The supreme court of the United States has decided that the right, *stricti jure*, still exists as a settled and undoubted right of war recognised by the law of nations, although it was, at the same time, admitted to be the universal practice at present to forbear to seize and confiscate debts and credits, as also to seize and confiscate enemy's tangible property found in the country at the opening of the war.<sup>1</sup> The court would not confiscate without an act of the legislative power declaring its will that such property should be condemned. Mr. Justice Story dissented in a most able and learned opinion. Mr. Phillimore makes a distinction between debts due from the State, in its corporate capacity, to individuals,—money invested in the public funds and the like,—and private debts of individuals of the one State to individuals of the other. While admitting that private debts may be confiscated, *stricti jure*, although modern custom is opposed to the exercise of that right, he says that the opinion of Vattel, Emerigon and Martens, against the lawfulness of confiscating those due from the State to enemy's subjects, 'now may happily be said to have no gainsayers.' Wildman says: 'It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because he cannot be compelled, like other men, in an adverse way in a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that during war they suffered no inquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many

<sup>1</sup> See *ante*, p. 144. The Confiscation Act of the United States, passed in 1861, did not embrace *choses in action* such as State bonds.—*United States v. Virginia Bonds*, 9 *Pittsb. Leg. J.*, 377.

French had money in ours.' With respect to the confiscation of private debts, the same author considers that the rigid rule of Grotius and Bynkershoek has been more or less mitigated by the wise and humane practice of modern times. 'By the 34 *Geo.* 3, c. 79,' he says, 'the transmission of money due to the enemy was prevented; the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it.'<sup>1</sup>

§ 18. After a full examination of the authorities and decisions on this question, Chancellor Kent says: 'We may, therefore, lay it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the union, by a special law for that purpose, to confiscate debts contracted by our citizens, and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience of modern times.' On this ques-

<sup>1</sup> Wildman, *Int. Law*, vol. ii. pp. 10, 11; Cicero, *de Off.*, lib. iii. cap. xxvi.; Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. i. § 6; lib. iii. cap. vii. §§ 3, 4; Puffendorff, *De Jur. Nat. et Gent.*, lib. viii. caps. vi. xix. xx. xxiii.; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. vii.; Vattel, *Droit des Gens*, liv. iii. ch. v. § 77; Hamilton, *The Federalist*, *Camillus*, Nos. 18-23; *Brown v. The United States*, 8 *Cranch. R.*, 110; Phillimore, *On Int. Law*, vol. iii. §§ 87-89, and see vol. ii. p. 196.

The Congress of the Confederate States enacted in August, 1861, that property of whatever nature, except public stocks and securities, held by an alien enemy since May 21 of that year, should be sequestered and appropriated as directed by the Act. Further, the Attorney-General of the Confederate States declared that all persons who had a domicil within the States, with which the Confederate Government was at war, were subject to the provisions of the Act. Lord John Russell instructed the British Consul to remonstrate strongly with the Secretary of State of the so-called Confederate States, on the hardship and injustice of the Act as regarded neutrals, insisting that the modern rule of international usage that the property and debts of an enemy, at the beginning of hostilities, are not liable to be confiscated as prize of war, applied with still more force in a civil war between different parts of a confederation, during whose union the subjects of foreign States were invited to settle indiscriminately, without any ground for contemplating a disruption. No notice, or time, had allowed them to separate their affairs from either belligerent, and though technically liable to be considered enemies, it was impossible to treat them as such, without gross injustice and a breach of faith.—*Parl. Papers*, 1862, *N. Amer.*, 108.

It is a principle of the prize procedure of the United States, that belligerent captors are discharged of liens, or equities, of neutral creditors, resting upon the effects of an enemy seized at sea.—The 'Sally Magee,' *Blatchf., Pr. Cas.*, 382.



tion, Mr. Wheaton remarks: 'In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a policy of a more liberal, or at least, of a wiser character, than in respect to droits of admiralty. A maritime power, which has an overwhelming superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or ever practically exerted. The right of the original creditor to sue for the recovery of the debt is not extinguished; it is only suspended during the war, and revives in full force on the restoration of peace. Such, too, is the law and practice in the United States. The debts due by American citizens to British subjects before the War of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries.' By the treaty of 1794, between the United States and Great Britain, it was stipulated that debts due from individuals of the one nation to individuals of the other, should never, in any event of war or national differences, be sequestered or confiscated.<sup>1</sup>

§ 19. While the English text-writers and jurists have contended for the right to seize and sequester the property of an alien enemy found in British territory, at the declaration of a war, as a right conceded by the law of nations, they have almost uniformly denied the right to confiscate debts due to such enemy, on the ground that usage and custom have annulled that right. The distinction thus attempted to be drawn between debts and other property is not well founded in reason or authority, but has resulted, apparently,

<sup>1</sup> Kent, *Com. on Am. Law*, vol. i. p. 65; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 12; *The State of Georgia v. Brailsford et al.*, 3 *Dall. R.*, 4; ex parte Boussmaker, 13 *Vesey Jun. R.*, 71; the 'Nuestra Señora de las Dolores,' *Edw. R.*, 60; *Furtade v. Rodgers*, 3 *Bos. and Pull. R.*, 191; *Ware v. Hilton et al.*, 3 *Dall. R.*, 199.

from policy and interest. Mr. Wheaton gives several examples of the forced application of this doctrine. 'On the commencement,' he says, 'of hostilities between France and Great Britain, in 1793, the former power sequestrated the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional articles to the treaty of peace between the two powers, concluded at Paris in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration subsequent to 1792. The engagement, thus extorted from France, may be considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice, since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as *droits of admiralty*, were restored to the original owners under this treaty, on the return of peace between the two countries.'<sup>1</sup>

§ 20. The same author says: 'On the rupture between Great Britain and Denmark in 1807, the Danish ships, and other property, which had been seized in the British ports, and on the high seas, before the actual declaration of hostilities, were condemned as *droits of admiralty* by the retrospective operation of the declaration. The Danish government issued an ordinance retaliating this seizure, by sequestrating all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English court of king's bench determined that this ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations; the text-writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of this judgment may well be questioned. It has been justly observed that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason

<sup>1</sup> Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 12.



draws no distinction ; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations, by which the judgment of the sovereign may be guided.' In another place, Mr. Wheaton said, in reference to this transaction, 'It is difficult to show a reasonable distinction between debts contracted under the public faith in time of peace, and property found in the enemy's territory on the breaking out of the war, or taken at sea before the declaration of hostilities.' The amount of Danish property condemned by the British government in 1807, as droits of admiralty, was computed at one million two hundred and sixty-five thousand pounds, while the debts due to British subjects, sequestrated by Denmark, amounted to only from two hundred thousand pounds to three hundred thousand pounds.<sup>1</sup>

<sup>1</sup> Wheaton, *suprà*.

The history of the well-known Silesian loan is as follows :—A loan of 80,000*l.* had been advanced by subjects of Great Britain to the Emperor Charles VI. on the security of the Duchies of Silesia. This territory was, in course of time, transferred to Prussia by virtue of the treaties of Breslau and of Dresden, in consideration of which cession Prussia was to discharge the debt. The King of Prussia, however, attached the debt by way of retortion, which, by the terms of the treaty, he had no power to do. The Duke of Newcastle, the minister of the day, took the opinion of the law officers of the Crown, who reported that the King of Prussia had pledged his royal word to pay the Silesian debt, and ought to be compelled to make good his engagement. The Duke of Newcastle thereupon enforced the obligation to pay the debt in the following letter :

'The Duke of Newcastle to Mr. Mitchell, the King of Prussia's Secretary of Embassy.

'Whitehall, February 8, 1753.

'SIR,—I lost no time in laying before the King the memorial which you delivered to me, on November 23 last, with the papers that accompanied it.

'His Majesty found the contents of it so extraordinary, that he would not return an answer to it, or take any resolution upon it, till he had caused both the memorial and the *Exposition des Motifs*, &c., which you put into my hands soon after, by way of justification of what had passed at Berlin, to be maturely considered, and till His Majesty should thereby be enabled to set the proceedings of the Court of Admiralty here, in their true light, to the end that His Prussian Majesty and the whole world, might be rightly informed of the regularity of their conduct ; in which they appear to have followed the only method which has ever been practised by nations, where disputes of this nature could happen, and strictly to have conformed themselves to the law of nations, universally allowed to be the rule in such cases, when there is nothing stipulated to the contrary, by particular treaties, between the parties concerned.

§ 21. As remarked in a preceding paragraph, it is not, in all cases, easy to determine from what circumstances, and at what period, war shall be said to have commenced, so as to

‘This examination, and the full knowledge of the facts resulting from it, will show so clearly the irregularity of the proceedings of those persons, to whom this affair was referred at Berlin, that it is not doubted, from His Prussian Majesty’s justice and discernment, but that he will be convinced thereof, and will revoke the detention of the sums assigned upon Silesia, the payment of which His Prussian Majesty engaged to the Empress Queen to take upon himself, and of which the reimbursement was an express article in the treaty, by which the cession of that Duchy was made.

‘I, therefore, have the King’s orders to send you the Report made to His Majesty, upon the papers above mentioned, by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, His Majesty’s Advocate-General in the Courts of Civil Law; Sir Dudley Rider and Mr. Murray, His Majesty’s Attorney and Solicitor-General. This report is founded upon the principles of the laws of nations, received and acknowledged by authorities of the greatest weight in all countries; so that His Majesty does not doubt but that it will have the effect desired . . .

‘Sixthly—That even though reprisals might be justified by the known and general rules of the law of nations, it appears from the Report, and indeed from considerations which must occur to everybody, that sums due to the king’s subjects by the Empress Queen, and assigned by her upon Silesia, of which sums His Prussian Majesty took upon himself the payment, both by the Treaty of Breslau and that of Dresden, in consideration of the cession of that country, and which, by virtue of that very cession, ought to have been fully and absolutely discharged in the year 1745, that is to say, one year before any of the facts complained of did happen, could not, either in justice or reason, or according to what is the constant practice between all the most respectable Powers, be seized or stopped by way of reprisals . . .

‘It is material to observe upon this subject, that this debt on Silesia was contracted by the late Emperor Charles VI., who engaged not only to fulfil the conditions expressed in the contract, but even to give the creditors such further security as they might afterwards reasonably ask. This condition has been very ill performed by a transfer of the debt, which has put it in the power of a third person to seize and confiscate it.

‘You will not be surprised, Sir, that in an affair that has so greatly alarmed the whole nation, who are entitled to that protection that His Majesty cannot dispense with himself from granting, the King has taken time to have things examined to the bottom, and that His Majesty finds himself obliged by the facts to adhere to the justice and legality of what has been done in his courts, and not to admit the irregular proceedings which have been carried on elsewhere . . .

‘The King is fully persuaded that what has passed at Berlin, has been occasioned solely by the ill-grounded information which His Prussian Majesty has received of these affairs, and does not at all doubt but that when His Prussian Majesty shall see them in their true light, his natural disposition to justice and equity will induce him immediately to rectify the steps, which have been occasioned by those informations, and to complete the payment of the debt, charged on the Duchy of Silesia, according to his engagement for that purpose.

‘I am, &c., &c.,

‘HOLLES NEWCASTLE.’



fix the character of a public enemy on the State with which it is waged. Where a public declaration or manifesto pre-

The following is an extract from the seventh proposition of the above-mentioned report :—

‘The King of Prussia has engaged his royal word to pay the Silesia debt to private men. It is negotiable, and many parts have been assigned to the subjects of other Powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt, due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no enquiry to be made, whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours. This loan to the late Emperor of Germany, Charles VI., in January 1734-5, was not a State transaction, but a mere private contract with the lenders who advanced their money upon the Emperor’s obliging himself, his heirs, and posterity, to repay the principal with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction, or abatement whatsoever.’

The King of Prussia listened to the remonstrance of the British Government, and the debt was paid.

In 1840, Lord Howard de Walden, by order of the British Government of the day, thus addressed the Portuguese Government, with reference to the claims of the British Legion, and of the British auxiliary force in Portugal, the Duke of Wellington, and others :—

‘The undersigned has, therefore, been instructed to propose, to the Government of Her Most Faithful Majesty, a convention for the settlement of these claims, a draught of which he has the honour to enclose ; and to declare to the Government of Her Most Faithful Majesty, that solely in the advent of the proposed convention being agreed to, without delay, will Her Majesty’s Government be satisfied. There being no question involved in the consideration of the proposed convention, which requires any length of time for decision, the undersigned is instructed to declare that, unless he is able to return the proposed convention ratified within a fortnight, Her Majesty’s Government will proceed to take such steps as may appear to them to be proper for the purpose of obtaining redress, after having so repeatedly and earnestly, though in vain, claimed it from the Government of Portugal.’

This energetic language had the desired effect : the Portuguese Government conceded the just claims of the parties, and paid interest as well as principal.

A corporation of Irishmen, existing in a foreign country and under the control of a foreign Government, must be considered as a foreign corporation, and is not therefore entitled to claim compensation for the loss of its property, under a treaty giving the right of doing so to British subjects.—*Long v. Commissioners for claims on France*, 2 *Knapp*, *P. C. R.*, 51.

The payment of a moiety of the Russian-Dutch loan, is an instance of an obligation undertaken, by Great Britain, for a permanent equivalent, in consideration of Holland agreeing that Great Britain should retain

cedes hostilities, the war exists from the time it is declared. But such a precedent declaration is not, as has already been

certain Dutch colonies and dependencies, of which Great Britain was in possession at the conclusion of the war, in 1814. Great Britain took upon herself the obligation of a moiety of a certain loan, made by Holland to Russia, during the war. It was recited in the fifth article of the Convention of London (May 19, 1815), that it was understood and agreed between the high contracting parties (Great Britain, the Netherlands, and Russia), that the payment on the part of the King of the Netherlands and the King of Great Britain should cease and determine (such payments being payments of an annual interest, of five per cent., together with a sinking fund, of one per cent.), if the possession and sovereignty of the Belgic Provinces should at any time pass, or be severed, from the dominions of the King of the Netherlands, at any time before the complete liquidation of the same; and that it was also understood and agreed, between the high contracting parties, that the payments on the part of their Majesties, the King of the Netherlands and the King of Great Britain, as aforesaid, should not be interrupted in the event of a war breaking out between any of the three high contracting parties, the Government of His Majesty, the Emperor of all the Russians, being actually bound to his creditors by a similar agreement.

Upon the separation of the Belgic Provinces from the kingdom of Holland, in 1831, Great Britain entered into a new convention with Russia, conceiving that, though the event had happened, which, according to the letter of the convention of 1815, released Great Britain as well as Holland from the obligation of continuing to pay off her portion of the loan, Great Britain was still bound, according to the *spirit* of the convention, which was made on her part, in consideration of the general arrangements of the Congress at Vienna, to adhere to her engagements. A new convention between Russia and Great Britain was accordingly executed (London, November 10, 1831), whereby the King of Great Britain undertook to recommend to the British Parliament, to enable him to continue the payments stipulated in the convention of May 19, 1815, conformably to the manner, and until the liquidation of the sum therein specified. Notwithstanding that open war arose between Great Britain and Russia in 1854, Great Britain never faltered in her good faith in the matter of the understanding between herself and the other two Powers, as set out in the fifth article of the convention; and the interest and instalments of the loan have been regularly voted, without the slightest interruption, by the British Parliament, and paid by the British Government to the agents of the Russian Government. Further, when a motion was made by Lord Dudley Stuart in the House of Commons, in the month of August, 1854, during the war with Russia, that Great Britain should renounce her obligation to make any further payments of the loan, upon the ground that Russia had violated the general arrangements of the Congress of Vienna, the motion was rejected on this, amongst other grounds, that Great Britain, being at war with Russia, was bound, by a regard to national honour, to be more than ever jealous of affording the slightest grounds for the accusation that she wished to repudiate debts justly contracted, with the Power which was for the time her enemy.—Sir Travers Twiss, *Law of Nations*, vol. ii., 112.

In 1861, the British Government withdrew its legation from Mexico. This was, in the words of Earl Russell, 'forced upon Her Majesty's Government by continual disregard of the rights of British subjects, and of the obligations of international engagements, which rendered it im-



stated, necessary to legalise hostilities ; and, by modern usage, it is sometimes dispensed with, and the war commenced without any public notice or warning. Not only reprisals, but acts of more positive aggression, under the sanction and authority of the government, sometimes precede the declaration of war, and are covered by its retroactive effect. Again, in other cases, no declaration or manifesto is ever issued, or, if issued at all, it merely recognises the war, as that between the United States and Mexico, to be an existing fact. Where the government itself has fixed no positive time for the commencement of hostilities, either past or future, and where its intentions are at all doubtful, the conduct of individuals is entitled to a lenient and favourable construction. A court will not, in such cases, condemn property as involved in trade with the enemy, unless fully satisfied, not only that hostilities existed, but that the fact was so public and notorious that the knowledge of its existence was justly to be imputed to the parties by whom the acts of supposed illegality were committed or authorised. It would be plainly unjust to confiscate property, or annul contracts, where reasonable doubts exist, either as to the intentions of the government, or the knowledge of the parties.

possible for Her Majesty's Government to hold relations with the constituted authorities.' The Governments of France and Spain had also serious grounds of complaint against the Mexican authorities. The three Powers agreed to combine in an expedition, *to enforce the respective claims* of those countries against the Government of Mexico.

A convention was signed in London, October 31, 1861, between them, reciting that 'feeling themselves compelled, by the arbitrary and vexatious conduct of the authorities of the Republic of Mexico, to demand more efficacious protection for the persons and properties of their subjects, *as well as a fulfilment of the obligations contracted* towards their Majesties, by the Republic of Mexico,' they agreed to dispatch combined naval and military forces to Mexico, engaging meanwhile not to seek for themselves in the employment of the contemplated coercive measures any acquisition of territory, nor any special advantage, nor to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government. Further, it was agreed that a commission, to be appointed by the three Powers, should determine all questions as to the distribution of the sums of money which might be recovered from Mexico, having regard to the respective rights of the three Powers. Great difference of opinion prevailing among the commissioners, caused Great Britain and Spain to withdraw in April, 1862, from joint action with France. The British intervention only accomplished the objects which were originally stipulated, but France went further, and attempted to obtain security against the recurrence of the evils complained of.

§ 22. The same leniency is certainly due to neutrals in such cases. Where there has been no official declaration of war, and no notification by manifesto of its actual existence, the conduct of neutrals is entitled to the most favourable construction, and neutral property cannot be condemned, for violation of neutral duty, without proof that the war *de facto* was so public and notorious that the neutral could not have been in ignorance of its existence. But where such knowledge is actually brought home to him, it seems to us to place him in the same position, with respect to the character of his acts, as if an official declaration or manifesto had been issued. Hautefeuille, however, thinks the declaration or manifesto absolutely essential to bind neutrals. Even in the case of defensive war, supposed by Vattel, where the party attacked is required to repel hostilities, belligerent rights accrue as against the enemy only, but not with respect to neutrals. So far as they are concerned, such hostilities are to be regarded precisely as if they did not exist. But this view is not supported either by reason or usage.<sup>1</sup>

§ 23. A declaration of war does not *ipso facto* extinguish treaties between the belligerent States. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations as are made expressly with a view to a rupture, such as limitations of the general rights of war, etc. So of treaties of commerce and navigation; they are generally either suspended or entirely extinguished by a war between the parties to such treaties. All stipulations, with respect to the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties, are not impaired by supervening hostilities, this being the very contingency intended to be provided for, but continue in full force until mutually agreed to be rescinded. There are many stipulations of treaties, which, although perpetual in their character, are suspended by a declaration of war, and can only be carried into effect on the return of peace. This subject has been already noticed in a preceding chapter.<sup>2</sup>

§ 24. We have mostly confined our remarks to the effects

<sup>1</sup> Hautefeuille, *Des Nations Neutres*, tit. iii. ch. i.; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 51.

<sup>2</sup> See *ante*, Chap. VIII.



of a declaration of war upon belligerent States and their subjects in their international relations. Its effects upon the relations of the citizens of a belligerent State with their own government belong to constitutional or municipal law, rather than to general public law ; nevertheless, as there are certain general principles which govern these relations in all countries and under all governments, it may be proper to allude to them in this place. For example, any place, port, town, fortress, or section of country occupied by the enemy, is, for most purposes, regarded in law as *hostile territory*, so long as such occupation is continued. If the place so occupied were previously neutral, or a part of our own territory, it is no longer regarded as such, for it would be absurd to suppose that persons who are hostile themselves, or who are under a hostile authority, are to exercise the same civil rights as neutrals or citizens in time of peace. The relations of the government to a place or territory so occupied or situated, are of a military character, and consequently are not regulated by the civil laws, which are made for the condition of peace. This change of relation, or rule of government, does not result from anything in the particular constitution or laws, but from the *fact* of the existence of war and the hostile occupation of the place. The same rule applies to a place, or district of country, which is invaded or besieged by an enemy; the *fact* of the invasion or beleaguerment is, in itself, a substitution of military for civil authority ; the absence of peace suspends the law of peace, and the presence of war substitutes military rule. What is called a declaration of martial law in one's own country, is the mere announcement of a fact ; it does not, and cannot, create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without the authority of the civil law, may justify the suspension of the power of such tribunals and the substitution of martial law. The law of war, or at least many of its rules, are merely the results of a paramount necessity. On this point we quote the language of Attorney-General Cushing : 'There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce, and therefore to justify, such suspension of all law, and involving, for the time, the omnipotence of military power. But such a necessity is not of the

range of mere legal questions. When martial law is proclaimed, under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact. In a beleaguered city, for instance, the state of siege lawfully exists, because the city is beleaguered, and the proclamation of martial law, in such case, is but notice and authentication of a fact,—that civil authority has been suspended, of itself, by the force of circumstances, and that, by the same force of circumstances, the military has had devolved upon it, without having authoritatively assumed, the supreme control of affairs in the care of the public safety and conservation. Such, it would seem, is the true explanation of the proclamation of martial law at New Orleans by General Jackson.<sup>1</sup> The declaration, or exercise of martial law in a foreign country, by the commander of an invading, occupying, or conquering army, is an element of the *jus belli*, and will be more particularly treated of in the chapters on the rights of military occupation and of complete conquest.<sup>1</sup>

§ 25. *Martial law* has often been confounded with *military law*, but the two are very different. Military law, in the U.S., consists of the 'rules and articles of war,' and other statutory provisions for the government of military persons, to which may be added the unwritten or common law of the 'usage and custom of military service.' It exists equally in peace and in war, and is as fixed and definite in its provisions as the admiralty, ecclesiastical, or any other branch of law, and is equally, with them, a part of the general law of the land. But, in the words of Chancellor Kent, 'martial law is quite a distinct thing.' It exists only in a time of war, and originates in military necessity. It derives no authority from the civil law (using the term in its mere general sense), nor assistance from the civil tribunals, for it overrules, suspends and replaces both. It is from its very nature an arbitrary power, and 'extends to all the inhabitants (whether civil or military) of the district where it is in force.' It has been used in all countries and by all governments, and is as necessary to the sovereignty of a State as the power to declare and make war. The right to declare, apply, and enforce martial law, is one of the sovereign powers, and resides in the govern-

<sup>1</sup> *Vide post*, Chapters XXXIII. and XXXIV. ; Cushing, *Opinions of U. S. Att'ys Gen.*, vol. viii. pp. 365, et seq.



ing authority of the State, and it depends upon the constitution of the State whether restrictions and rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence. But even when left unrestricted by constitutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice ; and, as 'paramount necessity' alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require ; and, moreover, it must be governed by the rules of general public law, as applied to a state of war. It, therefore, cannot be despotically or arbitrarily exercised, any more than any other belligerent right can be so exercised.<sup>1</sup>

§ 26. The laws of different countries, with respect to the application and exercise of this power, are very different. In the jurisprudence of France, for example, three conditions of things are carefully defined and provided for: 1st. *The state of peace*, where all persons are governed by the civil or military authority, according to the class to which they belong, and the law applicable to the particular case ; 2nd. *The state of war*, where the law and authority governing depend upon the particular condition of the place and circumstances of the case, the civil authority sometimes acting in concert with, and sometimes in subordination to, the military ; and 3rd. *The state of siege*, where the civil law is suspended for the time being, or, at least, is made subordinate to the military, and the place is put under martial law, or under the authority of the military power. This may result from the presence of a foreign enemy, or by reason of a domestic insurrection, and the rule applies to a district of country as well as to a fortress or city. A similar system is adopted in Spain, and in most of the countries of continental Europe. 'The state of siege of the continental jurists,' says Cushing, 'is the proclamation of martial law of England and the United States, only we are without law on the subject, while in other countries it is regulated by known limitations.' The English common law authorities, and commentators, generally confound *martial* with *military* law, and consequently throw very little light upon the subject considered as a domestic fact, and, in parliamentary debates, it has usually been discussed as a *fact*

<sup>1</sup> O'Brien, *American Military Law*, p. 28.

rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which martial law has been declared and enforced in time of rebellion or insurrection, not only in India and British colonial possessions, but also in England and Ireland. It seems that no act of parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the *fact* of martial law.<sup>1</sup>

§ 27. Martial law is not mentioned by name in the constitution or statutes of the United States, nor is there much light thrown upon the subject by the constitutions and laws of the several States of the Union, or the decisions of our courts. It is true that the constitution recognises the *fact* that there may be cases of rebellion and invasion, but it has made no general provision for the supposable or necessary

<sup>1</sup> Block, *Dic. de l'Admin. Française*, passim; Escriche, *Dic. de Leg. y Jurisprudencia*, passim; Cushing, *Opinions of U. S. Att'ys Genl.*, vol. viii. pp. 366 et seq.; Stephen, *Commentaries*, vol. ii. p. 602; Hansard, *Parl. Deb., N. S.*, vol. xi.; third series, vol. 115; Grant v. Gould, 2 *H. Blackst. R.*, 98; Bowyer, *Universal Pub. Law*, p. 424.

Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes (*Hist. C. L.*, ch. ii.), in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and, therefore, it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice, according to the laws of the land. Wherefore Thomas, Earl of Lancaster, being condemned in Pontefract, 15 Edward II., by martial law, his attainder was reversed, 1 Edward III., because it was not done in time of peace. And it is laid down that if a lieutenant, or other, that has commission of martial authority, doth in time of peace hang, or otherwise, execute, any man by colour of martial law, this is murder; for it is against *Magna Charta*. The Petition of Right, moreover, enacts that no commission shall issue to proceed within this land, according to martial law. And also, that no soldier should be quartered on the subject without his own consent. But by the annual Mutiny Act, this last provision is altered, and it is enacted that the constable may billet officers and soldiers in inns and victualling houses, and the allowances, both to the soldier and innkeeper, are regulated by this Act. The militia also are billeted in like manner, by Statute. After the restoration, King Charles II. kept up about five thousand regular troops by his own authority, for guards and garrisons, which King James II. increased by degrees to no less than thirty thousand, all paid from his own civil lists; but it was made one of the articles of the Bill of Rights, that the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law.—*Black. Comm.*, vol. i. ch. xiii.

British courts martial are regulated by the Mutiny Act, by the Articles of War, and by the General Orders of the sovereign relating thereto, and extant at the time; their practice is moreover regulated, in points wher



incidents to such a condition of affairs. The only clause having direct relevancy to this subject is the declaration that 'the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.' Now, the suspension of the writ of *habeas corpus* is not in itself a declaration of martial law; it is simply an incident, although a very important incident to such declaration. In other words, the incident is constitutionally provided for, while the substance, or general principle, is merely recognised, but in no other manner alluded to. Probably the framers of that instrument saw the difficulty of attempting to regulate, by any fixed rules, that which results from paramount necessity alone, and which, from its very nature, is scarcely susceptible of minute regulation. Practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of *habeas corpus*,—that is, the withdrawal of a particular person, or of a particular place or district of country from the authority of the civil tribunals. A mere declaration of martial law, no matter how much, 'in case of rebellion or invasion, the public necessity may require it,' would be utterly useless unless accompanied by a suspension of the privileges of the writ of *habeas corpus*; for if the local civil authorities were permitted, in such a case, to enforce this writ, they might, and some probably would, render the military powerless to provide for 'the public safety.' Hence, in the United States, the two—martial law

the written law is silent, and chiefly, as affects the form adhered to, by the Custom of War; which, as regards the British Army, consists of its customs and usages.

The Mutiny Act takes effect, and continues in force, within Great Britain, from April 25 of one year to the same date in the following year; in Ireland, Jersey, Guernsey, Alderney, Sark, and Man, from and to May 1; in Gibraltar and the Mediterranean, Spain and Portugal, from and to August 1; in all other parts of Europe, where the British forces may be serving, in the West Indies and America, from and to September 1; at the Cape of Good Hope, the Isle of France and its dependencies, St. Helena, and the western coast of Africa, from and to January 1; in all other places, from February 1 of one year to the same date in the ensuing year; but, notwithstanding these specified dates, by a provision first introduced into the Mutiny Act of 1829, it becomes and is in full force beyond the seas, from and after its receipt and promulgation in general orders.—*Mut. Act*, s. 89; *Circ.*, War Office, April 8, 1829; Simmon's *Courts Martial*, c. 3.

Since, in time of peace, serious offences of the Army are tried, in Great Britain, in the civil courts, it may be well to mention that by par. 13, sec. 3, of Queen's Regulations, 1870, a soldier, when on duty under arms, is to take off his cap, in the presence of a magistrate, in a civil court.

and the suspension of the writ,—although differing as the whole differs from a part, have been practically regarded as one and the same thing. The clause of the federal constitution which restricts the suspension of this writ to cases where ‘the public safety may require it,’ is contained in the first article of that instrument, and hence, it has been inferred by some, that inasmuch as that article relates principally to the powers of congress, it was intended that congress alone should have power to suspend this writ. But this negation of power is general in its terms, and is found in the section of things denied, not only to congress, but to all other branches of the federal government, and to all the States. It is not a delegation of power, but a limitation,—a negative rather than a positive enunciation,—of a power, the previous existence of which is recognised; and this negative reaches all the functionaries, legislative and executive, civil and military, not only of the federal government, but also of the State governments; that is to say, there can be no valid suspension of the writ of *habeas corpus*, ‘unless when, in case of rebellion or invasion, the public welfare may require it.’ There must be two coexisting facts, in order to make it valid: 1. The fact of ‘rebellion or invasion;’ and 2. the fact that ‘the public safety requires it.’ It is very evident, from their nature, that both of these facts may occur when congress is not in session, or, if in session, may occur in some remote part of the country—say in Oregon or California—where its action could not reach till long after the public exigencies had passed. In such a case how is ‘the public safety’ to be provided for if congress alone can suspend this writ? Again, these two facts may occur in a State where there is a rebellion against the State government, but not against any authority of the United States; may not the State government, in accordance with its own constitution, suspend this writ? It is so held. But, if it be true that the federal constitution confines this power to congress alone, how can it be exercised by a State? And if by a State, why not by the executive of the United States? ‘The executive power’ of the government is vested in the President, and he is the ‘commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States,’ and it is his duty to resist an ‘invasion,’ and to suppress an ‘insurrection;’ it would, therefore, seem to



properly devolve upon him, and upon those acting under his authority for the accomplishment of these objects, to enforce martial law, or to suspend the writ of *habeas corpus*, 'in case the public safety may require it.' If the previous action of congress be necessary, in each particular case, to render such suspension valid, it is evident that there can scarcely ever be a valid suspension of this writ, for 'the public necessity' will almost always have passed before any legislative action can be had in the premisses. It would, therefore, seem more consonant with the principles of legal interpretation, and with the nature of the case, to regard this clause in the constitution as a limitation of a general power existing in *the government*, rather than as conferring or delegating that power to any particular branch or functionary of that government, and, consequently, that this power does not belong *exclusively* to congress, but may also be exercised by the executive, subject always to his liability to impeachment by congress.<sup>1</sup>

<sup>1</sup> By Act of Congress, March 3, 1863, it was enacted that, during the rebellion, the President of the United States, whenever in his judgment the public safety might require it, was authorised to suspend the privilege of the writ of *habeas corpus* in any case, throughout the United States, or any part thereof. And whenever, and wherever, the said privilege should be so suspended, no military or other officer should be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but, upon the certificate under oath of the officer, having charge of anyone so detained, that such person was detained by him as a prisoner, under authority of the President, further proceedings under the writ of *habeas corpus* should be suspended by the judge or court who had issued the writ, so long as such suspension by the President should remain in force, and the rebellion continue.

See Egan's case (13 *Pittsb. Leg. J.* 514) as to the effects of martial law in the United States, and when it may be declared.

A person who was a resident, during the civil war of 1861-65, of a loyal State, in which he was then arrested, who was never resident in any State engaged in rebellion, nor connected with the confederate military or naval service, could not, according to the Supreme Court of the United States, be regarded as a prisoner of war, within the meaning of the act of March 3, 1863, authorising, on certain conditions, the discharge from imprisonment of persons held 'otherwise than as prisoners of war.'—(Supreme Ct.) *Ex parte Milligan*, 4 *Wall.*, 2.

In May, 1865, the Attorney-General of the United States gave his opinion, that the persons implicated in the murder of President Lincoln, and in the attempted assassination of the Hon. William H. Seward, Secretary of State, and further implicated in an alleged conspiracy to assassinate other officers of the Federal Government, at Washington, together with their aiders and abettors, could be lawfully tried before a military commission.

By order of the War Department, a circular was issued to the army of the United States, in February, 1866, that copies of such newspapers as

It must be admitted, however, that commentators on the constitution have expressed the opinion that this power is vested in congress alone; but they seem to have assumed this construction rather than to have fully considered and discussed the question in all its bearings. There has not been, so far as we are aware, any authoritative decision of the Supreme Court of the United States on the subject, for the question was not raised in *ex parte* Bolman and Swartout,<sup>1</sup> but the inferior courts have generally held that the direct action of the legislative power is necessary in all cases to authorise the suspension, and that, without this essential prerequisite, they would enforce the writ in all places, against all persons, and under all circumstances whatsoever. It should be remarked, however, that some of these opinions have been given in cases of conflict between the courts and the executive or military authorities, where passions were excited, and where the judges appeared more anxious to exercise their own prerogatives than to preserve and sustain the government of their country. Judicial opinions given under such circumstances are entitled to very little weight. The judges who rendered these decisions seem to have overlooked the fact that *war*, resulting from rebellion or invasion, is, from its very nature, a substitution of military for civil authority. That the latter authorities do not and cannot perform their ordinary functions, is to be presumed from the fact that war exists, for if the courts could enforce the laws there would be no occasion for the action of the military power—there could be, constitu-

were published in the several military departments, and which contained sentiments of hostility to the Government, should be sent to headquarters, and that it should be stated whether such papers were habitual in the utterance of such sentiments, for the persistent publication of articles calculated to keep up hostility of feeling between the people of different parts of the United States, could not be tolerated.

The terms of surrender, embraced in the agreement of Sherman and Johnson, by which it was stipulated that the Confederate officers and men should not be molested by the authorities of the United States, were granted in the exercise of a belligerent right merely, and not in the exercise of a sovereignty. The President could only delegate to his subordinate officers such powers as were vested in him as the military chief of the nation. The agreement was, therefore, merely a military parole, and terminated with the war. During the war, the United States Circuit court would not have permitted a Confederate officer, included in the capitulation, to have been arrested on its process, but after the war was ended, such arrest on a charge of treason was lawful.—United States *v.* Rucker, 1 *Am. Law Rev.*, 217. <sup>1</sup> *Cranch, R.*, p. 101.



tionally and legally, no *war*. Moreover, when a military force is called out to repel an 'invasion,' or to suppress a 'rebellion,' it is not placed under the direction of the judiciary, but under that of the executive. Suppose the military force, legally and constitutionally called into service for the purposes indicated, should find it necessary, in the course of its military operations, to occupy a field or garden, or to destroy trees or houses belonging to some private person, can a court, by injunction, restrain them from committing such waste? It can do so in time of peace, and if its powers are to continue in time of war, the judiciary, and not the executive, will command the army and navy. The taking or destroying of private property in such cases is a military act—an act of war, and must be governed by the laws of war; it is not provided for by the laws of peace. In the same way, a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually a *prisoner of war*. No matter what his alleged offence, whether he is a rebel, a traitor, a spy, or an enemy in arms, he is to be held and punished according to the *laws of war*, for these have been substituted for the laws of peace. And for a person so taken and held by the military authority, a writ of *habeas corpus* can have no effect, because, in the words of the United States Supreme Court, 'the ordinary course of justice would be utterly unfit for such a crisis.' But this view has been objected to on the ground that it allows too much power to the executive. This objection is answered by the court in the same case, as follows: 'It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual.'<sup>1</sup>

§ 28. Congress has never acted under this clause of the constitution, either to suspend the writ of *habeas corpus*, to authorise the suspension, or to approve or condemn the conduct of those who have suspended it. There, however, have been a number of occasions on which it has been suspended by the executive and military authorities of the United States.

<sup>1</sup> *Luther v. Borden*, 7 *How. R.*, 1; *Martin v. Mott*, 12 *Wheat. R.*, 19; *Story, Com. on the Constitution*, § 1342; *Johnson v. Duncan et al.*, 3 *Martin R.*, *O. S.* p. 530, and see *post*, vol. ii. p. 454.

During the administration of President Washington, in the Pennsylvania 'Whisky Insurrection' of 1794 and 1795, the military authorities engaged in suppressing it disregarded the writs which were issued by the courts for the release of the prisoners who had been captured as insurgents. General Wilkinson, under the authority of President Jefferson, during the Burr conspiracy of 1806, suspended the privilege of this writ, as against the Superior Court of New Orleans. General Jackson assumed the right to refuse obedience to the writ of *habeas corpus*, first in New Orleans, in 1814, as against the authority of Judge Hall, when the British army was approaching that city; and afterwards in Florida, as against the authority of Judge Fromentin. The case of General Wilkinson was brought directly to the notice of Congress, but as that body refused either to approve or to disapprove his conduct, it has been claimed that this non-action of the national legislature was a tacit acquiescence in the power of the President to authorise the suspension of this writ, 'when in case of rebellion, or invasion, the public necessity may require it.'<sup>1</sup>

§ 29. But suppose it should be definitively decided that congress alone is empowered to suspend the privilege of this writ, and cases of 'rebellion or invasion' should occur, where an imperious overruling public necessity required, from the President, or those under his authority, an exercise of this power, must he disregard 'the public safety,' and permit a judge, who is armed with this writ, to endanger or destroy the government? Even if it were plain that the words of the constitution were intended to give this power *exclusively* to congress, we think that in a case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and that a suspension of this writ, by the executive and military authorities of the United States, would be justified by the pressure of a visible public necessity; if an act of indemnity were required, it would be the duty of congress to pass it. But if the President should exercise, or should authorise others to exercise this power improperly, or unnecessarily, he would be liable to impeachment.<sup>2</sup>

<sup>1</sup> Parton, *Life of Jackson*; Hamilton, *Hist. of the Republic*, vol. vi.; Wilkinson, *Memoirs*.

<sup>2</sup> Cushing, *Opinions of U. S. Att'ys Gen.*, vol. viii. pp. 365 et seq.



§ 30. We remark, in conclusion, that the right to declare, apply and exercise martial law, is one of the rights of sovereignty, and is as essential to the existence of a State as is the right to declare or carry on war. It is one of the incidents of war, and, like the power to take human life in battle, results directly and immediately from the fact that war legally exists. It is a power inherent in every government, and must be regarded and recognised by all other governments; but the question of the authority of any particular functionary to exercise this power is a matter to be determined by local and not by international law. Like a declaration of siege or blockade, the power of the officer who makes it is to be presumed until disavowed, and neutrals, who attempt to act in derogation of that authority, do so at their peril.<sup>1</sup>

<sup>1</sup> *Vide post*, Vol. II. Chap. XXV.

END OF THE FIRST VOLUME.

## APPENDIX.

*Vol. I., page 61. CYPRUS.*

By a Convention of defensive alliance between Great Britain and Turkey, 4th June 1878, it was agreed, that if Batoum, Ardahan, Kars, or any of them should be retained by Russia, and if any attempt should be made at any future time by Russia to take possession of any further territories of the Sultan in Asia, that England engaged to join the Sultan in defending them ; and in return the Sultan promised to introduce reforms, to be agreed upon, into the Government, and for the protection of the Christian and other subjects of the Porte ; and in order to enable England to execute her engagement, he consented 'to assign the island of Cyprus to be occupied and administered by England.'

In an annex to this Convention, made the 1st July 1878, England agreed to the following conditions :—(1) That a Mussulman religious tribunal should continue to exist in Cyprus for the exclusive cognizance of religious matters concerning the Mussulman population ; (2) that a joint Mussulman and British authority should administer the property belonging to mosques and other religious establishments in Cyprus ; (3) that England would pay to the Porte whatever then was the existing excess of revenue over expenditure in the island ; this excess to be calculated on the average of the last five preceding years, stated to be 22,936 purses, and to the exclusion of the produce of State and Crown lands let or sold during that period ; (4) that the Porte might sell and lease lands in Cyprus belonging to the Ottoman crown and State (*Arazii Miriye' ve emlaki houmayoun*), the produce of which does not form part of the revenue of the island referred to in Art. 3 ; (5) that the English Government might purchase compulsorily land required for public purposes or land which is uncultivated ; (6) that if Russia should restore to Turkey, Kars, and the other conquests made by her in Armenia during the last preceding war, Cyprus would be evacuated by England.

By an Agreement made at Constantinople, 14th August 1878, it was declared to be understood between the High Contracting Parties that the Sultan, in assigning Cyprus to be occupied and administered by England, 'thereby transferred to and vested in Her Majesty the Queen for the term of the occupation, and no longer, full powers for making laws and conventions for the government of the island in Her Majesty's name, and for the regulation of its commercial and consular relations and affairs free from the Porte's control.' By virtue of the above authority a High Court is established in Cyprus,



in which, according to the words of the Ordinance, and subject to other provisions of the same, 'criminal and civil jurisdiction is, so far as circumstances admit, exercised on the principles of, and in conformity with, the statute law and other law for the time being in force in and for England.'

*Vol. I., page 137. TERRITORIAL WATERS.*

By the 41 and 42 Vict., c. 73, passed by the British Parliament, 16th August 1878, an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea, within such part of the sea adjacent to the coast of the United Kingdom, or to the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship; and the person who has committed such offence may be arrested, tried, and punished accordingly by British officials. 'Within the jurisdiction of the Admiral' means, for the purposes of this Act, any part of the open sea within one marine league of the coast, measured from low water mark. Proceedings cannot be taken under this Act without the consent of the Secretary of State or Governor of the colony.

*Vol. I., pp. 157, 164. MARRIAGE AND DIVORCE.*

The Court of Appeal having thus declared the marriage null on questions of *law*, the questions of *fact* raised by the Queen's Proctor in 1876 were determined by the Court of Probate in August 1879. The Court held that there had been no fraud or collusion between the parties, but that they had intended to contract marriage, and that the domicile of the husband was at that time in England. Further, that the validity of a marriage in England must, though the domicile of one of the parties be foreign, be decided according to the law of England; that marriage is based upon the contract of the parties, but it is also a status arising out of the contract, to which each country is entitled to attach its own conditions both as to its creation and duration; that the ignorance of the parties as to the effects of Portuguese law upon the validity of the ceremony could not effect the validity of the marriage, and that the marriage was lawful. (*Sottomayor v. De Barros*, L. R. 5, Prob. Div. 94.)

Two English persons married in England in 1862. The husband afterwards went to Kansas, in the United States, and after an interval of a year presented a petition, and obtained a divorce by reason of his wife's desertion. He then married again. The wife received no notice of the petition. Held by the Court of Probate in England that his domicile at the time of the divorce was English, and therefore the divorce was void.

*Query*—Whether the domicile of the wife is the domicile of the husband, so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile. (*Briggs v. Briggs*, L. R. 5, Prob. Div. 163.)

The English Divorce Court will recognise as valid the decree of a Scotch court dissolving the marriage of domiciled Scotch persons, though the marriage was solemnized in England, and the woman was English prior to her marriage.

*Semble.* In some cases the English Divorce Court might recognise as valid the decrees of a foreign court dissolving the marriages of English persons. (*Harvey v. Farnie*, L. R. 5, Prob. Div. 153; and confirmed on appeal.)

*Vol. I., page 167. PUNISHMENT OF SAVAGES.*

A British subject having been murdered in 1877 by a native in the island of Tanna, H.M.S. *Beagle* proceeded thither; the murderer was tried by two naval officers, was found guilty, and executed by hanging at the foremast of the *Beagle*, the commander being aware that Sir George Innes, Attorney-General for New South Wales, had already given an opinion, based on previous decisions, that there was no jurisdiction in the colonial courts to try such islanders, they not being British subjects, and the crime not being committed within British territory. The Admiralty deemed that the commander had adopted the most humane course, and approved thereof, but considered it would have been more satisfactory if the execution had taken place on shore instead of on board ship; that the only real justification for so unusual a mode of punishment lay in the circumstance that the crime committed was not justiciable by any civilized tribunal, and was of such a nature as not to admit of any more merciful course being adopted; but that it would be more desirable in any future case that the chiefs of the tribe themselves should, whenever practicable, inflict the punishment on the native.

The Attorney-General in the House of Commons supported the action of the naval officers; not that they or any other Englishman had any jurisdiction to try the native, but because when a savage attacks a British subject, and when it is necessary for securing the rights of British subjects to levy war on savages, England was perfectly justified in so doing.

*Vol. I., page 181. IMMUNITY OF FOREIGN GOVERNMENT VESSEL.*

Held by the Court of Appeal, in February 1880 (reversing the decision of the Admiralty Division), that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit *in rem* to recover redress for a collision; and this immunity is not lost by reason of the packet also carrying merchandise and passengers for hire; and that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, am-



bassador, or property be within its territory. (The 'Parlement Belge,' L. R. 5, Prob. Div. 197.) It is to be noted that this decision appears to have been based, not on the fact that the vessel was a *quasi* ship of war, but on the fact that she was the property of a sovereign. It is therefore submitted that this decision does not grant to such vessels immunities recognised as appertaining to ships of war—such, for instance, as immunity from search.

*Vol. I., page 208. FUGITIVE SLAVE CIRCULAR.*

By the Addenda of 1880 to the Queen's Regulations and Admiralty Instructions of 1879, the following Article with regard to fugitive slaves is to be considered part of the Slave Trade instructions, in lieu of the Circular dated 5th December 1875, and is to be considered as addressed to, and as intended for the guidance of commanding officers of Her Majesty's ships generally.

Art 22.—1. 'In any case in which you have received a fugitive slave into your ship and taken him under the protection of the British flag, whether within or beyond the territorial waters of any state, you will not admit or entertain any demand made upon you for his surrender on the ground of slavery.'

2. 'It is not intended, nor is it possible, to lay down any precise or general rule as to the cases in which you ought to receive a fugitive slave on board your ship. You are, as to this, to be guided by considerations of humanity, and these considerations must have full effect given to them, whether your ship is on the high seas or within the territorial waters of a state in which slavery exists; but in the latter case you ought, at the same time, to avoid conduct which may appear to be in breach of international comity and good faith.'

3. 'If any person, within territorial waters, claims your protection on the ground that he is kept in slavery contrary to treaties with Great Britain, you should receive him until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British Consular authority, and you should be guided in your subsequent proceedings by the result.'

4. 'A special report is to be made of every case of a fugitive slave received on board your ship.'

*Vol. I., page 210. EXTRADITION.*

Extradition treaties have also been entered into by Great Britain with—

France, 14th August 1876;

Spain, 4th July 1878;

Portugal, 26th December 1878 (for the extradition of persons for crimes committed in the Indian dominions of either party);

Switzerland, 26th November 1880 (not yet ratified, but the treaty of 31st March 1874 is prolonged until such ratification).

*Vol. I., page 237. POSTAL UNION.*

By a Convention entered into at Paris in 1878 (by virtue of Art. 18 of the Treaty of Berne, 1874), Great Britain and certain British colonies, Germany, the Argentine Republic, Austria-Hungary, Belgium, Brazil, Denmark and the Danish colonies, Egypt, Spain and the Spanish colonies, the United States of North America, France and the French colonies, British India, Canada, Greece, Italy, Japan, Luxemburg, Mexico, Montenegro, Norway, the Netherlands and Netherland colonies, Peru, Portugal and the Portuguese colonies, Roumania, Russia, Salvador, Servia, Sweden, Switzerland, and Turkey, subject to ratification, agreed that the countries above named, as well as those which might join it thereafter, should form, under the title of 'Universal Postal Union,' a single postal territory for the reciprocal exchange of correspondence by post, and certain stipulations were concluded in that behalf.

*Ibid. TRADE MARKS.*

By Declaration between Great Britain and the United States of America dated 24th October 1877, the subjects of each Power have in the dominions of the other, the same rights as belong to native subjects, or to subjects of the most favoured nation, in everything relating to 'trade marks,' on fulfilling the necessary formalities required by the respective countries. A similar Declaration was reciprocally entered into by Great Britain with Switzerland, 6th November 1880, with Portugal, 6th January 1880, and with Denmark, 28th November 1879.

*Vol. I., page 402. SLAVE TRADE.*

A law for the abolition of slavery in the island of Cuba was sanctioned by Spain, 13th February 1880.

A Convention between Great Britain and Germany was entered into, 29th March 1879, extending to the German Empire the provisions of the treaty between Great Britain, Prussia, Austria, France, and Russia, for the suppression of the Slave Trade, of the 20th December 1841. (This Convention to be ratified so soon as the other parties thereto have signified their consent.)

*Vol. I., page 407. COLLISION AT SEA.*

International regulations 'for preventing collisions at sea' were in 1880 agreed to by, and declared applicable to, the ships of Austria, Belgium, Brazil, Chili, Cochín, Denmark, Ecuador, France, Germany, Greece, the Hawaiian Islands, Hayti, Italy, Japan, Kattayawar, Khelat, Kutch, the Netherlands, Muscat, Norway, Portugal, Russia, Spain, Sweden, Travancore, Turkey, the United States of America, and Zanzibar. These regulations are held by the United States to be part of International Law, having been adopted by the principal maritime nations. (The *Scotia* and the *Berkshire* 14, Wall. 170.)



*Vol. I., page 412.* DESERTERS FROM MERCHANT SHIPS.

The latest Agreement on this subject is that between Great Britain and Germany of the 5th November 1879.

*Ibid.* DISTRESSED SEAMEN.

By an Agreement between Great Britain and Germany, 27th May 1879, mutual arrangements were made for the relief of distressed seamen of the two nations in certain cases. Similar Agreements were made by Great Britain with France, 5th November 1879 and with Italy, 8th June 1880.

[These pages to be gummed in at the end of the first volume; and for convenience of reference these subjects should be entered in the General Index.]









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